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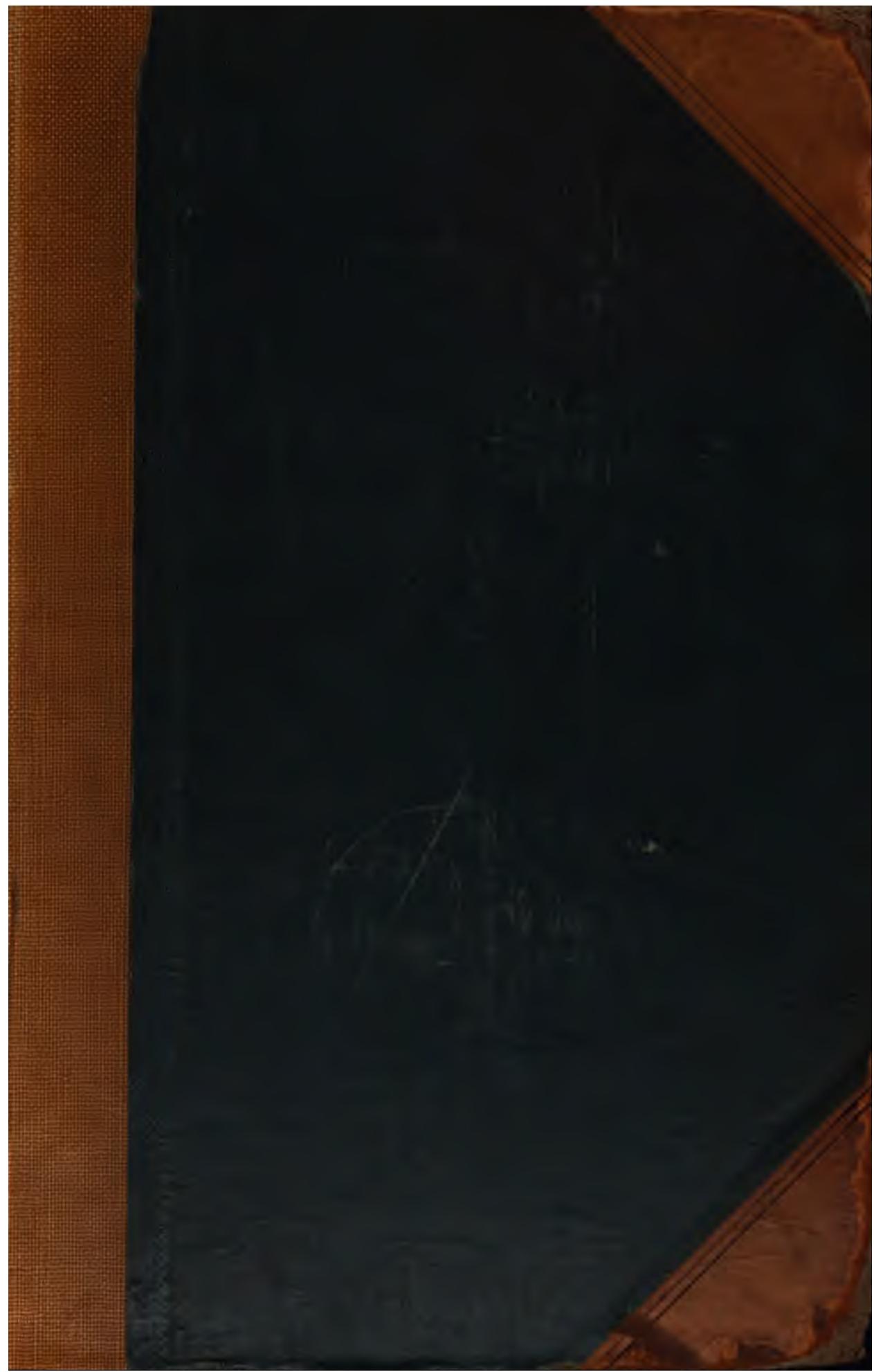
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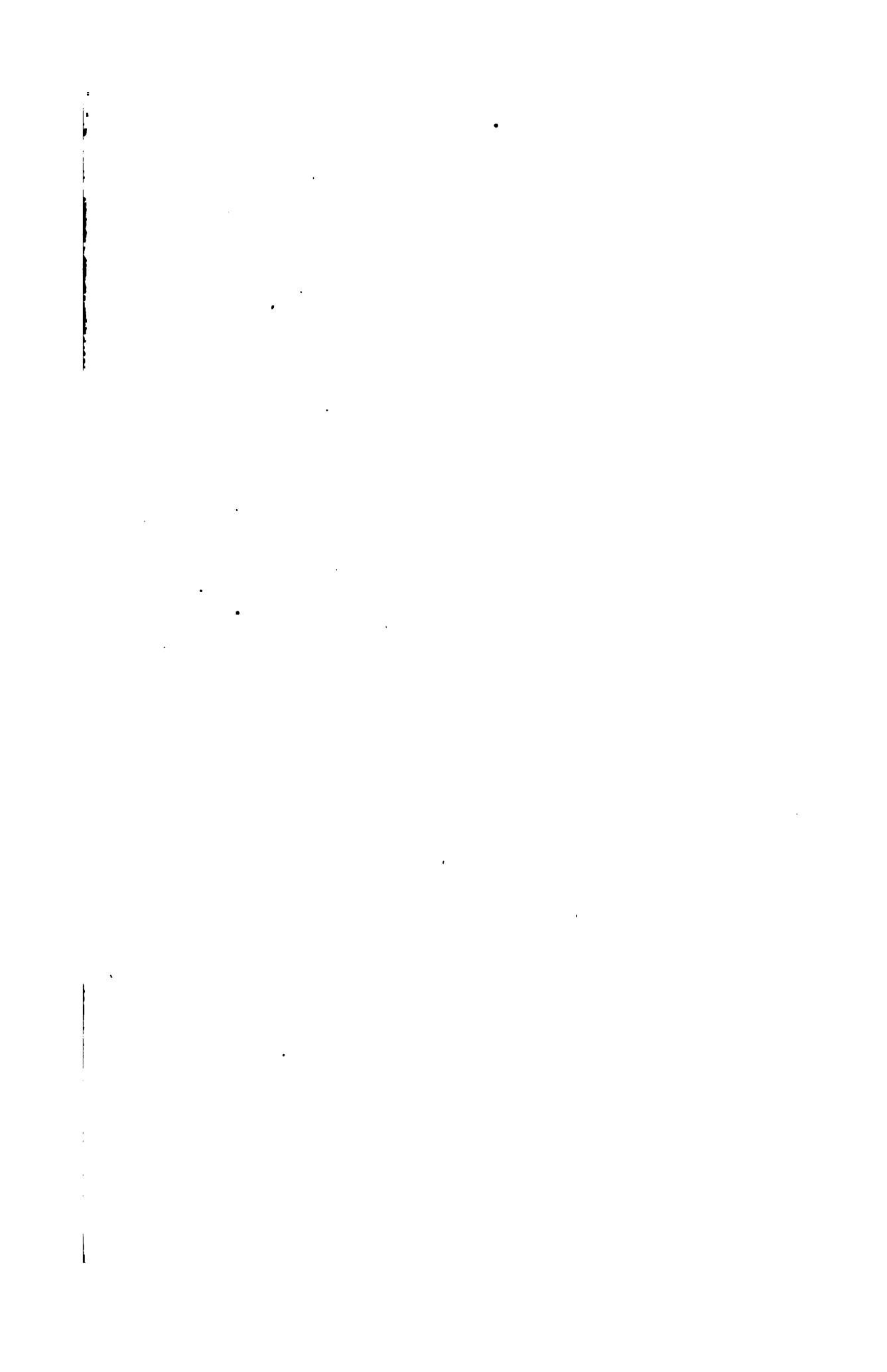


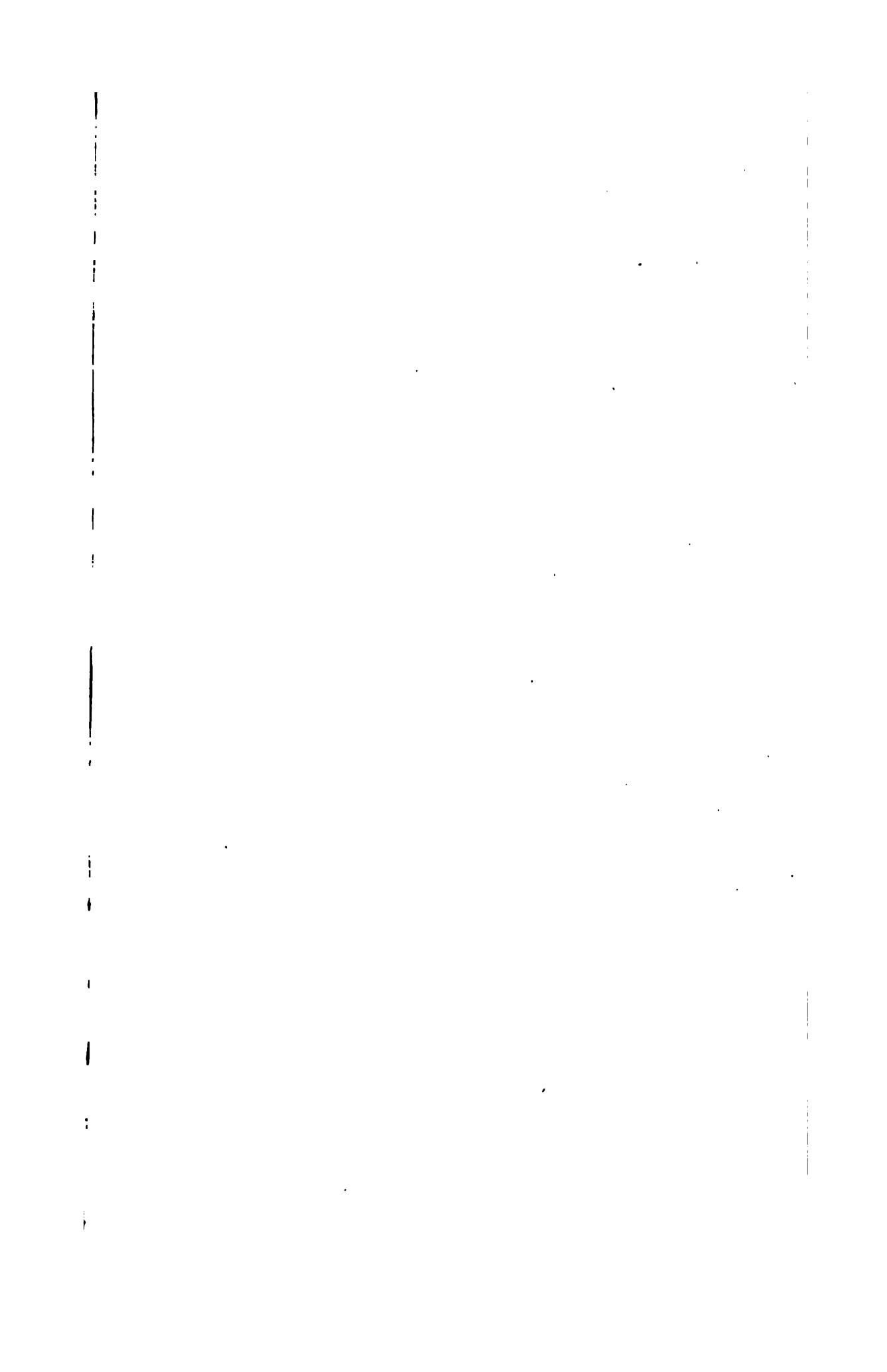
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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. I.

**EASTER TERM, 19 VICT., TO HILARY VACATION, 20 VICT.,
BOTH INCLUSIVE.**

BY
E. T. HURLSTONE, OF THE INNER TEMPLE,
AND
J. P. NORMAN, OF THE INNER TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

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J U D G E S
OF THE
COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

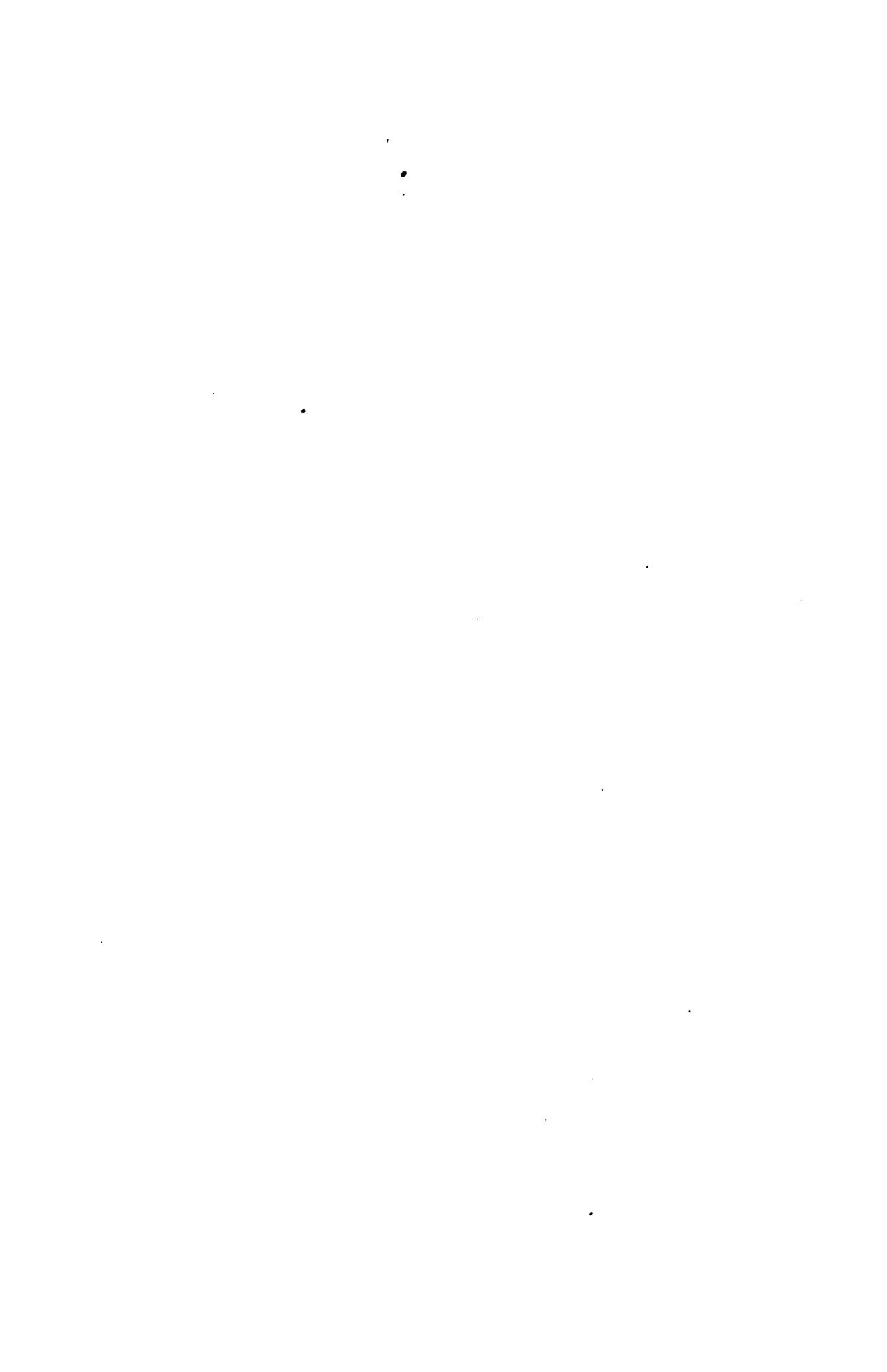
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Sir RICHARD BETHELL, Knt.
The Right Hon. JAMES STUART WORTLEY.



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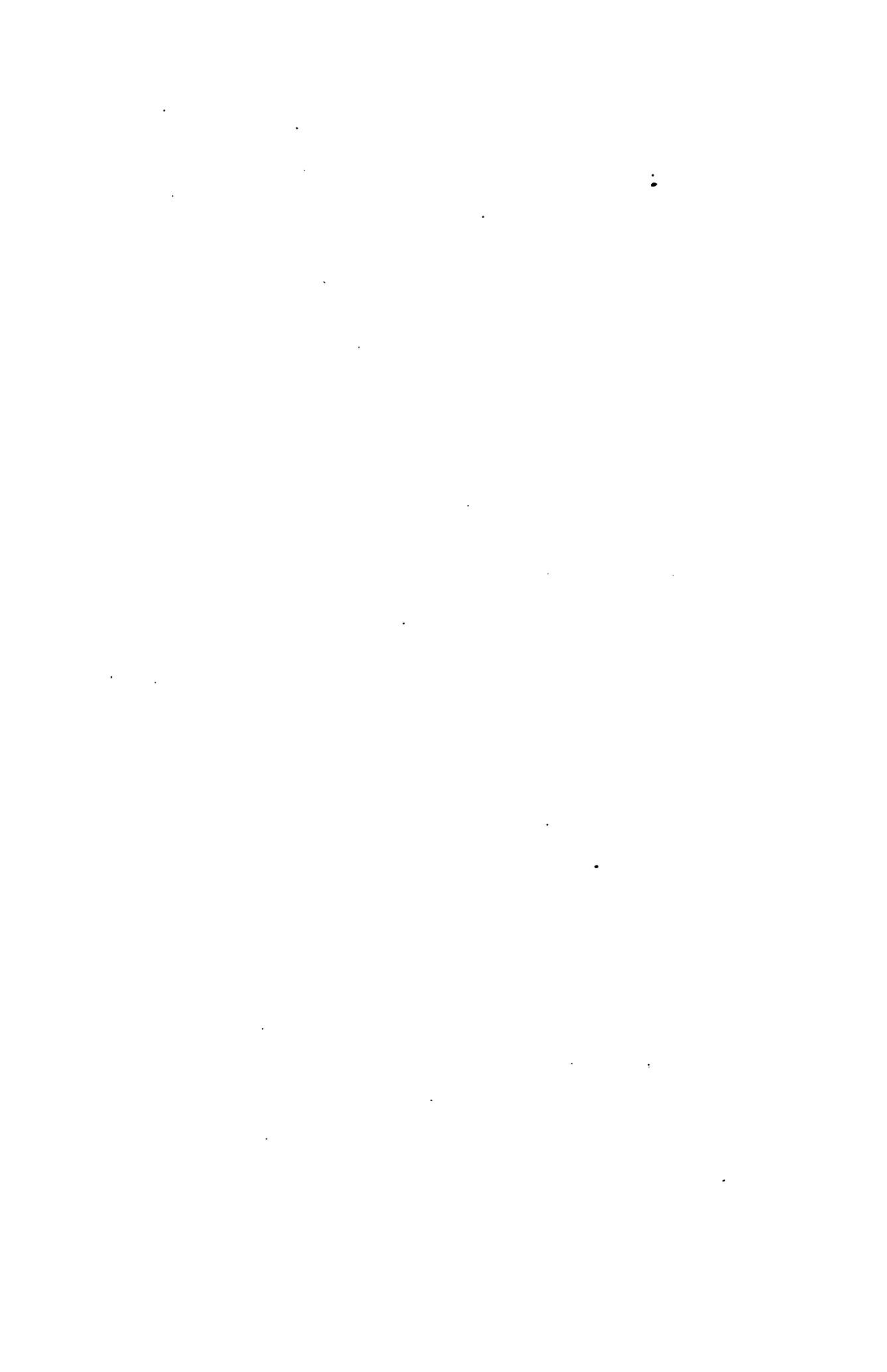
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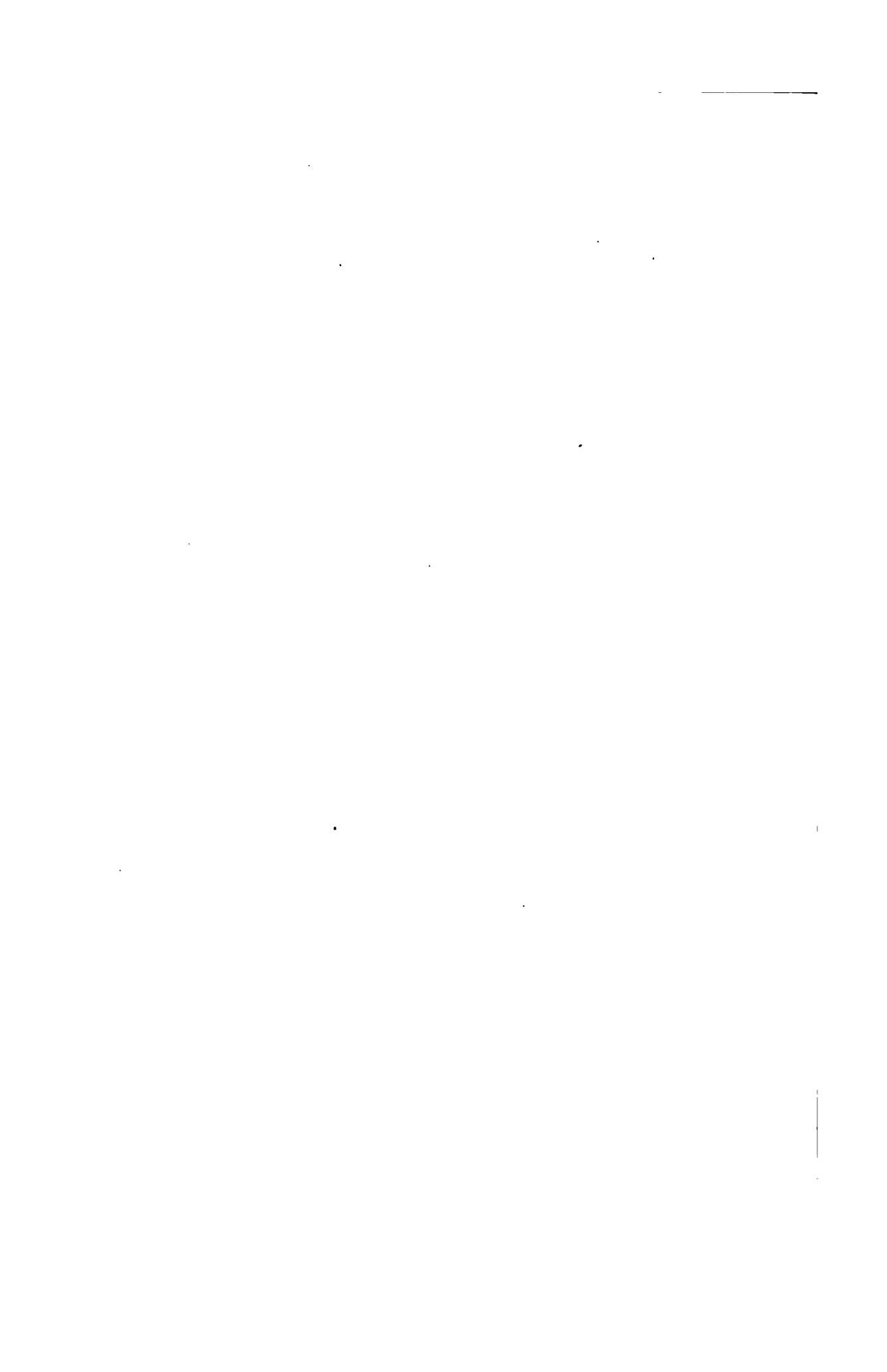
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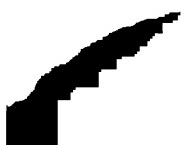
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ERRATA.

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13, reference (a), for "Wilton <i>v.</i> Robinson, 4 Q. B. 68," read "Wilson <i>v.</i> Robinson, 7 Q. B. 68."
21, marginal note, line 12, for "defendants" read "plaintiffs."
53, line 7 from the bottom, for "two" read "forty."
72, line 5 from the bottom, for "indorser" read "indorsee."
92, reference (a), for "Taunt. 161" read "2 Taunt. 161."
121, reference (b), for "2 Siderfin, 208" read "1 Siderfin, 208."
171, line 12 from the bottom, for "1844" read "1854."
212, reference (A), for "4 M. & Sel. 344" read "3 M. & Sel. 344."
247, marginal note, last line, for "plaintiff" read "defendant."
282, for "Leicestershire" read "Rutland."
286, reference (c), for "2 Roll. Rep. 369" read "2 Roll. Rep. 366."







Exchequer Reports.

EASTER TERM, 19 VICT.

1856.

April 17.

DARBY v. OUSELEY.

LIBEL.—The declaration stated that the plaintiff was an officer in Her Majesty's Customs, to wit, a tidewaiter, and that the defendant falsely and maliciously printed and published of the plaintiff in his character of tidewaiter, in a certain newspaper, called "The Liverpool Herald," the imputing to him that he was a papal rebel, a traitor, and an idolater; that he was a member of an association for the conversion of England to the Roman Catholic faith, and had enlisted himself in the service of a foreign potentate, and was bound never to decline from the purpose of annihilating all religious beliefs other than the Roman Catholic religion and Popery. The defendant pleaded, not guilty, and a justification of so much of the libel as imputed to him that he was a member of the association, &c. At the trial, the plaintiff, who was a witness, stated that he was a Roman Catholic, and had subscribed money to an association for the conversion of England to the Roman Catholic faith; but had done no other act to become a member of it.—*Held*: First, that he could not be asked, on cross-examination, whether his name was not written in a certain book of the association, no notice having been given to produce the book.

Secondly, (the plaintiff having admitted that he held himself bound by the canons and decrees of the Church of Rome), *Held*, that he could not be asked whether he considered himself bound by the notes and comments of the Rheims Testament, since that was an inquiry into his religious belief.

Thirdly, (the plaintiff having given in evidence a paragraph in a subsequent newspaper containing similar imputations against the plaintiff), *Held*, that the defendant was not entitled to have read as part of the plaintiff's case, a paragraph in that newspaper on the subject of "Papal Prosecutions," but having no reference to the other paragraph.

Fourthly, (the defendant's counsel having intimated his intention not to call witnesses), *Held*, that he had no right, in order to shew the doctrines of the Church of Rome, to read in his address to the jury, a Papal treaty with a Catholic State, nor canons, decrees or bulls of that church, nor the oath taken by Roman Catholic bishops, since those were matters of fact which ought to be proved.

Fifthly, *Held*, that the imputations being false in fact and without a justifiable occasion, the law implied malice.

Sixthly, *Held*, that there was no misdirection in omitting to tell the jury not to give damages in respect of the publication subsequent to the libel.

1856.

DARBY
v.
OUSELEY.

words following:—The declaration then set out the libel which was contained in an article, entitled “A Papal Rebel in Her Majesty’s Service.” It imputed to the plaintiff that he was a traitor and an idolater; it also alleged “that the plaintiff was a papist and member of an association for the conversion of England to the Roman Catholic religion and Popery, with a fixed resolution of never declining from such purpose till it was fully accomplished; that the association, of which the plaintiff was a member, directed its efforts in a *special way* to the point of converting all the people of England to the Roman Catholic religion and Popery, in order that when that object was gained the way might be opened to the extinction of all other religious opinions and beliefs, and to the spreading of the Roman Catholic religion and Popery throughout the whole world. That the plaintiff had enlisted himself in the service of a foreign potentate, and was bound never to decline from the purpose of annihilating all religious opinions and beliefs other than the Roman Catholic religion and popery. That he was a member of an association working with a fixed resolution to overturn the national faith,” &c.

Pleas.—First, not guilty. Secondly, to that portion of the libel imputing to the plaintiff that he was a member of the said association, &c.—That before and at the time of printing and publishing the supposed libels, the plaintiff being an officer in her Majesty’s Customs, as in the declaration mentioned, was also a Papist and a member of an association, formed and established with the approbation and under the authority of the Pope of Rome, for the conversion of England to the Roman Catholic religion and Popery; and as member of the said association he was solemnly pledged to devote himself to the work of the conversion of England as aforesaid, with a fixed resolution of never declining from such purpose till it was fully accomplished, which association

directed its efforts *in a special way* to the point of converting all the people of England to the Roman Catholic religion and Popery, in order that when that object was gained the way might be opened to the extinction of all other religious opinions and beliefs, and to the spreading of the Roman Catholic religion and Popery throughout the whole world; that the plaintiff had enlisted himself as a member of the said association in the service of a foreign potentate, to wit, the Pope of Rome, for the purpose aforesaid, and was bound as member of the said association never to decline from the purpose of annihilating all religious opinions and beliefs other than the Roman Catholic religion and Popery; and that the said association of which the plaintiff was a member was working with a fixed resolution to overturn the national faith; all which the association had proposed, declared, resolved, and agreed to before the said time when, &c.

Replications, joining and taking issue on the pleas.

At the trial, before *Willes*, J., at the last Liverpool assizes (the publication of the libel having been proved), the plaintiff, who was a witness in support of his case, stated that he was a Roman Catholic, and had subscribed money towards an association for the conversion of England to the Roman Catholic faith; but he had done no act to become a member of the association. The defendant's counsel, on cross-examination, proposed to ask him whether his name was not written in a certain book of the association. The learned Judge refused to allow the question to be put, on the ground that no notice had been given to produce the book. The plaintiff, having admitted that he held himself bound by the canons and decrees of the Church of Rome, and thought the Pope in council infallible, was asked by the defendant's counsel whether he considered himself bound by the notes and comments in the Rheims

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Testament. The learned Judge was of opinion that this question was an improper inquiry into the religious belief of the witness, and refused to allow it. The plaintiff's counsel, for the purpose of shewing the animus of the defendant, gave in evidence a paragraph in a subsequent number of "The Liverpool Herald," containing similar imputations against the plaintiff. The defendant's counsel thereupon required that another paragraph in the same paper, entitled "Popish Persecutions," and which professed to be copied from another newspaper, should be also read as part of the plaintiff's evidence; but the learned Judge refused to permit it, being of opinion that it was wholly irrelevant. At the close of the plaintiff's case, the defendant's counsel announced his intention not to call witnesses, and in his address to the jury he was about to read part of the Concordat lately entered into between the Pope of Rome and the Emperor of Austria, but was prevented by the learned Judge. He then proposed, in order to shew the doctrine of the Church of Rome with respect to heretics, to read certain canons and decrees of that church, viz., those of the Councils of Lateran, Arles, Sens, and Trent; also a paragraph from a book published by a Roman Catholic priest in 1822, entitled "Development of the Church of Rome in Ireland;" also, to read from histories the excommunication by the Popes of various heretical sovereigns; also, to read the bull "In Coena Domini," read every Maundy Thursday at Rome by the Pope; also, the oath of a Roman Catholic Bishop, from the *Pontificale Romanum*, and some of the notes to the Testament published by the Catholic College of Rheims in 1582. The learned Judge refused to allow him to read any of these documents, being of opinion that if they were of authority in Catholic countries, they ought to be proved as foreign law.

In summing up, the learned Judge expressed an opinion

that the question was merely one as to the amount of damage, but at the same time his Lordship left it to the jury to say whether the publication was a libel, and if so, to what damages the plaintiff was entitled. The jury found a verdict for the plaintiff, damages 45*l.*

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*Kenealy* now moved for a new trial on the grounds (amongst others) of the improper rejection of evidence and misdirection.—First, the learned Judge improperly refused to allow the plaintiff to be asked whether his name was written in a book of the association. That was not a question as to the contents of a written document, but as to a *fact* within the plaintiff's knowledge. [Alderson, B.—You wanted to shew, not that the book existed, but that the plaintiff's name appeared in it, that could not be done without proof of the book, and there had been no notice to produce it.] Payment may be proved by a person who paid the money, notwithstanding a receipt has been given. There are three cases in which written instruments must be produced, first, where the law requires an instrument in writing; secondly, where the writing is evidence of a contract between the parties, and thirdly, where there is a document the existence of which is disputed. None of these cases apply here. A parol admission by a party to a suit is receivable in evidence against himself, although it relates to the contents of a deed or other written instrument, and even though the contents be directly in issue in the cause: *Slatterie v. Poolcy* (a). [Pollock, C. B.—The distinction is this: If a party has chosen to talk about a particular matter, his statement is evidence against himself; for instance, if a plaintiff has been heard to say, "My attorney advised me to bring this action, but I know that I have executed a release to the defendant of all

(a) 6 M. & W. 664.

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claims in the suit," that admission is evidence against himself; and if the jury believe that he in fact executed such a release, they would be justified in finding a verdict for the defendant. But it does not follow that the plaintiff could be compelled to make such an admission by asking him, in the witness box, "Have you executed a release?"] By the 24th section of the Common Law Procedure Act, 1854, "a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the case, without such writing being shewn to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him," &c. [*Pollock, C. B.*—That section has no bearing on the present question; it relates to former statements of the witness inconsistent with his present evidence. Here the question was not as to former statements of the plaintiff, but whether his name appeared in a certain book.]—Secondly, the learned Judge improperly disallowed the question, whether the plaintiff considered himself bound by the notes and comments of the Rheims Testament. That question was admissible for four reasons: first, it would affect the plaintiff's credit, if not his competency; secondly, it would shew the illegal purposes for which the members of the association were bound together; thirdly, it would tend to mitigate the damages; and, fourthly, it had reference to the bona fides of the defendant. One of the charges in the alleged libel is, that the plaintiff not only contemplated the overthrow of the established religion and the extinction of heretics, but held doctrines subversive of all government, and it was therefore important to ascertain whether he acknowledged himself bound by the authority of a book in

which such doctrines were laid down. The Hindoo religion allows the giving false testimony in certain cases (Benth. Jud. Ev. vol. 1, pp. 235, 236; vol. 5, p. 134); and if a Hindoo were a witness, would it not be competent to ask him whether he entertained such doctrines?—Thirdly, the extract from the subsequent number of the “Liverpool Herald” was improperly rejected. In *Thornton v. Stephen* (*a*), Lord Denman, C. J., ruled, that in an action for a libel contained in a newspaper, the defendant has a right to have read, as part of the plaintiff’s case, another part of the same newspaper referred to in the libel complained of. [Bramwell, B.—There the paragraph read referred to a report contained in another column of the same newspaper, and that reference made the report part of the paragraph.] In *Ber v. Lambert* (*b*), Lord Ellenborough, C. J., ruled that on an information for a libel in a newspaper, the defendant has a right to have read any extract from the same paper connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter and printed in a different character. [Pollock, C. B.—Here it is proposed to read another passage in the same paper which has no relation to the paragraph read.] In *Cooke v. Hughes* (*c*), Abbott, C. J., said, “I have always understood the rule to be, that the defendant has a right to have the whole of the publication read. In the present state of the cause I cannot tell what the effect of reading the passages selected may be. If the object be further to libel the plaintiff, the defendant does it at his immediate peril, and the jury, if they shall think fit, may give increased damages on that account.” [Pollock, C. B.—No doubt if either party reads only a portion of a paragraph the other side may insist upon the whole being read. But that is not

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(a) 2 Moo. & R. 45.

(b) 2 Camp. 398

(c) R. & Moo. 112.

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this case].—Fourthly, the learned Judge improperly refused to allow the defendant's counsel to refer to the Austrian Concordat. He had a right to refer to it in order to shew that there was a system of religious feeling which tended to despotism. [Pollock, C. B.—If the defendant relied on the Concordat he was bound to give it in evidence.] Again, the learned Judge prevented the defendant's counsel from reading to the jury certain canons and decrees of the church of Rome, the bulls of the Popes, the book written by the Roman Catholic priest, in 1822, the *Pontificale Romanum*, and the Notes to the Rheims Testament. [Pollock, C. B.—It is the duty of a Judge to see that counsel does not state facts which he does not mean to prove. Under the 17 & 18 Vict. c. 125, s. 18, if counsel announces his intention not to adduce evidence he cannot afterwards do so. Alderson, B.—I so ruled on the last Spring Home Circuit.] These documents were not intended to be referred to as evidence, but only as illustrating the doctrines by which the plaintiff acknowledged himself bound. The works of Hume, Paley, Bolingbroke, Bacon, &c., are frequently cited as illustrating certain theories. On the trial of O'Connell in Ireland, in 1843, his counsel read to the jury extracts from newspapers published in 1831, containing accounts of political meetings at Birmingham, &c., and also speeches in parliament. [Pollock, C. B.—In *Rex v. Hone*, which was tried before Lord Ellenborough, the defendant cited numerous authors for the purpose of shewing that parodies, instead of being a contempt of the thing parodied, were a tribute to its merit. He shewed that Luther had parodied the Lord's Prayer, and Addison the Creed. Standard authors may be referred to for such a purpose, or as shewing the opinions of eminent men on particular subjects, but not to prove facts.]—Then with respect to the misdirection. First,

the learned Judge was wrong in laying down that the question was one of damages only. By the Reg. Gen. H. T. 16 Vict. pl. 16, "in an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed and with reference to the plaintiff's office, profession or trade," &c., and consequently it should have been left to the jury to say whether the publication was bona fide or malicious. [Alderson, B.—The law implies malice except where the occasion justifies the publication. Bramwell, B.—If a person writes defamatory matter of another, however honestly he may believe it to be true, if it be in fact untrue, the law implies malice.] In *Manning v. Clement* (a), which was an action for libelling the plaintiff in his trade of a manufacturer of bitters, it was held that, under the general issue, the defendant might give in evidence that the plaintiff's trade was illegal, and that his bitters had been condemned in the Exchequer. [Alderson, B.—Here there was no evidence of a justifiable occasion.] Secondly, the learned Judge should have directed the jury not to give damages for the publication subsequent to the libel, which could only be evidence to prove the animus of the defendant. [Pollock, C. B.—Matters occurring after action may be given in evidence to enhance the damages as shewing the malice of the original publication, just as a repetition of the same or a similar libel may be.]

POLLOCK, C. B.—We are all of opinion that there ought to be no rule. The first ground is the improper rejection of evidence. Mr. Kenealy says, that he asked the plaintiff whether his name was written in a certain book; and I presume that he described the book, so that the question

(a) 7 Bing. 362.

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was in substance this, "Is not your name written in the book of the association for converting the people of England to the Roman Catholic religion?" The learned Judge ruled that the question could not be put, and that the book itself ought to be produced. We are all of opinion that the Judge was right in point of law. The case of *Slatterie v. Pooley* does not support Mr. Kenealy's argument. I will not go through it, because I have already pointed out the distinction between that case and the present. The entry of the plaintiff's name in a book had no reference to any former statement made by him, so that the case is not within the 17 & 18 Vict. c. 125, s. 24. The object of the question probably was to shew, by the plaintiff's name being in the book, that he was a member of an association, the character and objects of which would justly subject him to the charges and imputations contained in the libel. But whatever was the object, that question could not be put, no notice having been given to produce the book.

Then the plaintiff having admitted that he was bound by the canons and decrees of the Church of Rome, and thought the Pope in council infallible, was asked whether he considered himself bound by the notes and comments in the Rheims Testament, which we are informed was originally published in the year 1582, and has been republished in modern times. The learned Judge thought that this was inquiring into the plaintiff's religious opinions, and would not allow the question to be put. I agree that a defendant has no right, for the purpose of justifying a libel of this kind, to inquire into the plaintiff's religious belief. It is said that the answer would go to the witness's credit; but that is not so. In this country the Roman Catholic religion is not only tolerated, but, with one or two exceptions, stands on the same footing as the Protestant; and I cannot accede to the claim to ask this sort of question, in order to shew

that a person is a Roman Catholic, and therefore a traitor and a rebel. I as little desire to see the opinions of that class extended as any one in this land, but while they are tolerated, and entertained by those of rank, station, and property in the country, it is scarcely to be borne that, because a person is a Roman Catholic, he is to be asked whether he is bound by the notes and comments in a certain Testament, and then the jury are to be told that these notes and comments lay down that no faith is to be kept with heretics, and justify the burning them.

The next question was this:—a passage having been given in evidence by the plaintiff, from a subsequent number of “The Liverpool Herald,” for the purpose of shewing that, after the publication of the libel complained of, the defendant called the plaintiff a traitor, Mr. *Kenealy* proposed to read as part of the same evidence, a paragraph in that paper, but copied from another paper, containing some statements relating to the dispute between the two churches. Upon looking at the article, it is sufficient to say that it has not the remotest tendency to explain, exculpate, modify or controul the other paragraph, and therefore, even if the rule were that counsel might call on the Judge to permit the reading of another paragraph in the same paper, still if, when examined, it is found to have nothing to do with the matter, I think that the allowing it to be read would be ground for a new trial. The authorities cited do not prove that when the plaintiff brings forward a specific paragraph, in which the defendant calls him a traitor subsequently to the publication of the libel, the object being to shew that the defendant published that libel maliciously and deliberately, the defendant has a right to read another article in the same paper, copied from another paper, and having no relation to the first.

The next objection was, that the learned Judge refused to allow the defendant's counsel, in his address to the

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jury, to tell them what the Austrian Concordat was, what were the canons of the Councils of Lateran, Arles, Sens and Trent; and again, that the learned Judge prevented him, when he proposed to read a pamphlet published by a Roman Catholic priest in 1822. No doubt under certain circumstances, counsel and defendants (as in Hone's case) have been permitted to refer very largely to printed works. If a question arose as to composition, for the purpose of shewing that a particular expression was not in reproach, but laudatory; or that certain words were not used in an ironical sense, works in prose and verse may be referred to. On the trial of Mr. O'Connell very large quotations were made from books and speeches; so also, in an information against John and Leigh Hunt, for a seditious libel (*a*), Lord Brougham quoted several books not in evidence, but when, on a subsequent occasion, he proposed to read books for the purpose of proving facts, Lord *Ellenborough* interrupted him, saying that he might refer to particular writers upon general subjects, but that he could not bring forward their statements to prove facts. It could never be supposed that books might be referred to for the purpose of proving the best mode of conducting agriculture. If a landlord complained of a farmer for not properly cultivating his land, he could not refer to books in order to shew in what way the land ought to be cultivated, for that must be proved before the jury, who are sworn to try *secundum allegata et probata*. So, in an action on a warranty of a horse, it would not be allowable to refer to works of a veterinary surgeon in order to shew what is unsoundness. In this case the defendant's counsel proposed to read certain specific canons, not as matters of speculative opinion, but as canons of the Church of Rome, promulgated by authority and sanctioned by the Pope in council. These are matters of fact, and if of any authority, ought to have been proved. The learned counsel

(*a*) 31 How. St. Tr. 367.

was opening a case for the defendant which consisted merely of observations on facts already proved; for he had announced his intention not to call witnesses, and therefore could not afterwards be allowed to do so. Then he proposed to read from various histories the excommunication by the Popes of heretical Sovereigns, and also to read the bull "In Coena Domini." The learned Judge very properly ruled that he might refer generally to the fact that Popes have excommunicated Sovereigns, but that he had no right to read the terms of a specific bull, as that was a matter to be proved. It is the same with respect to the "Pontificale Romanum," and the notes to the Rheims Testament. In short, the defendant's counsel wanted to prove certain facts: he opened them as facts, and supposed that, because he could find them in certain documents and books, he was relieved from the necessity of calling witnesses to prove them, thereby avoiding a reply. In that notion he was clearly wrong.

Then, with respect to the alleged misdirection. First, it is said that the learned Judge was wrong in laying down that the question was one of damages only; but though he stated his own view of the matter, he left it to the jury to say whether the publication was a libel. Then it is objected that the learned Judge did not tell the jury that they ought not to give damages for the publication subsequent to the libel. In one sense that may be so; but then the subsequent publication was evidence of malice, and would, therefore, aggravate the damages (*a*). For these reasons I think that there is no ground for a rule.

ALDERSON, B., and BRAMWELL, B., concurred.

Rule refused.

(*a*) See *Pearson v. Lemaire*, 5 Man. & G. 700; *Wilton v. Robinson*, 4 Q. B. 68.

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April 22.

## CROOMES v. GORE and Others.

## SAME v. EASTON and Another.

The successful party on a reference is not entitled to the costs of a short-hand writer's notes of the evidence, although the attendance of a second counsel, or of an attorney's clerk, to take notes would be allowed.

THESE were actions against the Commissioners of Woods and Forests and their engineers, for damage done to the foundation of the plaintiff's house by the sinking of artesian wells to supply the fountains in Trafalgar Square. The causes were referred to arbitration by order of Nisi Prius, the costs of the causes to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. Several meetings took place, and numerous scientific witnesses were examined on both sides. One counsel attended for each party. The plaintiff employed a short-hand writer to take down the evidence, and after each meeting the short-hand writer made a transcript of his notes, and the plaintiff's counsel was furnished with a brief copy of it for his guidance at the subsequent meetings. The arbitrator awarded in favour of the plaintiff, and directed that one moiety of the plaintiff's costs and the reference and award should be paid by the defendants in each action. In the plaintiff's bill of costs there were charges for the attendance of the short-hand writer, the transcript of his notes, attendance on him to receive same, and brief copies for counsel. On taxation, the Master disallowed all these charges, but he intimated that the case was of so much importance that he should have allowed for the two counsel.

Quain now moved for a rule calling on the defendants to shew cause why the Master should not review his taxation.—These costs were reasonably necessary. The proceedings on the reference were materially shortened by the notes of

the short-hand writer. The evidence was of that scientific and complicated nature that without such assistance one counsel could not have conducted the arbitration. At all events the plaintiff is entitled to the amount which would have been allowed to an attorney's clerk if he had attended to take notes. [Alderson, B.—The plaintiff should have retained a junior counsel or an attorney's clerk, and not a person who is uneducated as regards law. If we were to send the case back to the Master, we should be recognising a principle which is, in my opinion, objectionable, because I think that the costs of a short-hand writer ought not to be allowed. The costs of the attorney's clerk to take the notes is a reasonable charge, but copies ought not to be allowed. Copies of the notes of counsel would not be allowed.]

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POLLOCK, C. B.—I am of opinion that the Master is perfectly correct in what he has done.

ALDERSON, B., and BRAMWELL, B., concurred.

Rule refused.

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ALLEN v. THOMPSON.

April 29.

**T**HIS was an interpleader issue to try whether certain goods seized by the sheriff of Surrey, under a writ of fieri facias issued on a judgment against one Dove, were at the time of the delivery of the writ to the sheriff the property of the claimant (the now plaintiff) as against the execution creditor (the now defendant).

At the trial, before Bramwell, B., at the Middlesex Sittings in last Hilary Term, it appeared that the plaintiff claimed the goods in question, under a bill of sale, executed

A description of a clerk in a government office as "gentleman," is not a compliance with the 17 & 18 Vict. c. 36, which requires every bill of sale and a description of the occupation of the person giving the same to be filed.

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by Dove on the 28th November, 1854. Dove was a clerk in the Audit Office at Somerset House. In the bill of sale, which was filed pursuant to the 17 & 18 Vict. c. 36, the assignor was described as "James Douglas Dove, of No. 22, Union Grove, in the parish of Clapham, in the county of Surrey, Gentleman."

It was objected on the part of the defendant, that this was not a proper description of the occupation of the person giving the bill of sale, as required by the statute. A verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

Edwin James, in the same term (January 31), obtained a rule nisi accordingly, against which

Keating and R. M. Kerr now shewed cause:—The first section (*a*) of the 17 & 18 Vict. c. 36, enacts that every

(*a*) "Every bill of sale of personal chattels made, after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and oc-

cupation of the person making or giving the same, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to

bill of sale of person's chattels, or a true copy thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and "a description of the residence and *occupation* of the person making or giving the same" be filed within twenty-one days. This is not a misdescription which is calculated to mislead. The object of the statute was to prevent secret bills of sale, and the obtaining false credit by the apparent possession of goods. It requires bills of sale to be filed in like manner as warrants of attorney, otherwise they are void to all intents and purposes. If the statute be construed with strictness the slightest misdescription will vitiate a bona fide bill of sale. [Alderson, B.—Is it not clear, that if a grocer were described as a "gentleman" that would be wrong?] If the description is such as to enable any one to ascertain who is the assignor of the goods, that is a sufficient compliance with the statute. [Alderson, B.—Is not "clerk in the Audit Office" an employment, and "gentleman" a station rather than an occupation? Pollock, C. B.—In 1 Blackstone's Commentaries, p. 406, it is said "As for gentlemen, says Sir

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bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity, authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal

chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be."

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Thomas Smith (*a*), they may be made good cheap in this kingdom; for whoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, (to be short,) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman."] The residence of the assignor is correctly described, so that there would be no difficulty in identifying him. [Pollock, C. B.—In Webster's Dictionary "occupation" is defined as "the principal business of one's life, vocation, calling, trade, the business which a man follows to procure a living or obtain wealth." Martin, B.—If a clerk in a government office wanted to borrow money on the security of his furniture, and the person to whom he applied searched the register to see whether he had executed a bill of sale, such a description as this would be calculated to mislead him. Alderson, B.—The statute requires a description of the *occupation*, and that is not given; the party might as well have been described as an "esquire."] The 3rd section requires the officer to keep a book in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and *description* of the person making or giving the same, &c., according to the form contained in the schedule to this act. The term "occupation" does not occur there.

Edwin James and *Quain* appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B.—The rule must be absolute. In construing a new statute we are bound to take its plain language, and construe it as we would any other document.

(a) *De Republica Anglorum*, Lib. 1, c. 20.

The act in question intended that the *occupation* of the individual giving the bill of sale should be stated, as one of the means of identifying him, and I am not satisfied that, because in this particular case, the occupation was not wanted for the purpose of identification, it can be dispensed with. The act says that certain things shall be stated, if not the bill of sale shall be void.

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ALDERSON, B.—I am of the same opinion. "Gentleman" is not an occupation. A person who is clerk to the Audit Office occupies himself there with the duties of clerk.

MARTIN, B., concurred.

Rule absolute.

WILLIAMS v. THE AFRICAN STEAM NAVIGATION COMPANY.

April 25.

BLACKBURN had obtained a rule to shew cause why the plaintiff should not be at liberty to plead several replications to the fourth plea.

The action was for not safely delivering certain goods shipped on board a vessel of the defendants. The fourth plea stated, that at the time of the shipment and delivery to the defendants on board one of their ships, and the receipt and acceptance of the goods in the declaration mentioned, the plaintiff was a British subject, and the defendants a body corporate, having their principal place of business in the United Kingdom: that the ship on board which the goods were delivered belonged to the defendants, and was a British ship, and duly registered as such: that the goods consisted of gold dust; and that the portion not delivered, and alleged to have been lost, was feloniously stolen

A special replication may be allowed together with a general traverse of the plea, though it does not raise a distinct defence, where the special replication enables the parties to raise by demurrer the substantial question to be decided in the cause.

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without the actual fault or privity of the defendants, and that neither the owner nor the shippers declared in writing the true nature and value of the said goods.

To this plea the plaintiff proposed to reply:—First: joinder of issue. Secondly: after setting out the bill of lading in words and figures, that it was made and delivered to the plaintiff by the defendant's master; that the box mentioned in the bill of lading contained the gold dust, and that the defendants received freight for the value.

By the statute 17 & 18 Vict. c. 104, s. 503, owners are not liable for gold feloniously stolen, unless the value is declared. The question sought to be raised by the second replication was, whether the bill of lading, which merely set out the number of ounces, without stating the value in money, was a sufficient declaration of the value.

Tomkinson shewed cause.—The second replication is unnecessary. Though several replications are now allowed, they must be of distinct matters.

POLLOCK, C. B.—The replication tenders an issue in law; it enables the parties to raise, by demurrer, the question of the sufficiency of the declaration of the value of the gold. This is a convenient course, and may save the expense of a trial.

ALDERSON, B., and BRAMWELL, B., concurred.

Rule absolute, the defendants to be at liberty to demur and rejoin.

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PHILLIPS and Others v. BRIARD.

April 24.

THE declaration stated that a certain charter-party was made in London between the plaintiffs and the defendant as follows:—

London, Feb. 24, 1854.

Charter-party.

It is this day mutually agreed between Peter Briard, Esq., owner of the good ship or vessel called the Maggie, A 1, of Jersey, of the measurement of 335 tons, or thereabouts, now in the London Docks, and Phillips, Shaw, and Lowther, that the said ship being tight, staunch, and strong, &c., shall, with all convenient speed, load from the factors of the said charterers about 75 tons of dead weight, and a full cargo of lawful merchandise, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture; the cargo to be brought to and taken from alongside at the charterer's risk

A declaration stated that by charter-party, it was agreed between the defendant, the owner of a ship called the "Maggie," being in the London Docks, and the defendants, that the ship should load a certain cargo, and therewith proceed to Hong Kong and deliver the same on being paid freight: "the ship to be consigned to the charterer's agents in China free of commission on this charter."

—Averments: That according to the custom of merchants in London, whenever a ship chartered in London for China is agreed to be consigned to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents as the consignees of the ship, to procure a charter or cargo for the ship for any voyage from such port; and they are entitled to be paid the usual broker's commission on the amount of freight payable under such charter, unless excluded by special contract: but in case the owners of the ship procure a charter or cargo for the ship for a voyage from such port without any default of the consignees, the consignees are entitled to the broker's commission on any freight payable under such charter-party, unless such right is excluded by special contract.—Breach: That although the ship was loaded and arrived in China, and the plaintiffs agents, as consignees, performed their duty free of commission on the outward voyage and cargo, and were ready to procure a charter or cargo from Hong Kong; and although the plaintiffs performed all conditions precedent, the defendants would not permit the plaintiffs agents to procure a charter or cargo for any voyage from Hong Kong; and the defendant without any default of the plaintiffs agents, procured a cargo to the United Kingdom, the usual broker's commission on which amounted to a large sum, yet the defendant has not paid or allowed the same to the plaintiffs or their agents, whereby the plaintiffs were obliged to pay their agents a compensation in respect thereof.

On demurrer: Held, that the declaration was bad, since the custom did not explain or annex as incident to the contract, but added a new term to it. Also, per *Bremell*, B., that the breach was wrongly assigned; for, assuming that the custom could be annexed to the contract as a usual term, the breach should have been that the defendant did not consign the ship to the plaintiffs agents on the usual terms.

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and expense ; and being so loaded, shall therewith proceed to Hong Kong and Canton, or so near thereto as she may safely get, and deliver the same on being paid freight at the rate of 45*s.* per ton of 20 cwt. for dead weight, and 60*s.* per ton of 40 cubic feet for other goods in full. The ship to be consigned to charterers' agents in China free of commission on this charter, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted. The freight to be paid as follows :—Two-thirds by bill at three months, or in cash under discount, at charterer's option ; any amount payable in China by bills of lading to be taken as part payment, and the balance on receipt of certificates of the right delivery of the cargo. Fifty running days are to be allowed the said merchant (if the ship is not sooner despatched) for loading the said ship at London from this date, and fifteen days on demurrage, over and above the said laying days, at 6*l.* per day. A commission of 5*l.* per cent. on this charter to be paid to H. and C. Toulmin, and on the ship's return to London to be addressed to them. Penalty for non-performance of this agreement 1,400*l.* The stevedore to be appointed by the charterers, and paid by the owners.

Phillipps, Shaw, and Lowther.

P. Briard.

Averments.—That, according to the well-established and universal custom of merchants in London at the time aforesaid, whenever a ship chartered in London for a voyage from London to a port in China or in the East Indies, is by the charter-party agreed to be consigned to the charterer's agents at such port in China or the East Indies, whether consigned free of commission on that charter or not, it is the right and duty of such agents, as the con-

signees of the said ship, to procure a charter or cargo for the said ship for any voyage from such port in China or the East Indies, and such agents are entitled to receive and be paid the usual broker's commission on the amount of freight payable under such charter or upon such cargo, unless excluded from such right by special contract; but in case the owners of the said ship procure a charter for the said ship or a cargo for the said ship, for a voyage from such port in China or the East Indies, otherwise than through the agency of such agents as the consignees of the said ship, without any default on the part of such consignees, such consignees are entitled to receive and be paid the usual broker's commission upon any freight payable under such charter-party or upon such cargo, unless such right to such commission be excluded by special contract; of all which premises the defendant, at the time of the making of the said charter-party, had notice, and that the said charter-party was made, and the said ship chartered in London according to the said custom.—Breach: that although the ship was loaded and arrived in China, and the plaintiffs agents, as consignees, performed their duty free of commission on the outward voyage and cargo, and were ready and willing to procure a charter or cargo from Hong Kong or Canton as aforesaid, whereof the defendant had notice; and although the plaintiffs performed all conditions precedent, &c., yet the defendant did not, nor would, permit the plaintiffs agents to procure a charter or cargo for any voyage from Hong Kong or Canton; and the defendant, without any default of the plaintiffs agents, procured a cargo to the United Kingdom, otherwise than through the agency of the said consignees or agents, and the ship sailed to the United Kingdom; the usual broker's commission on the amount of which freight amounted to a large sum, to wit, &c.; yet the defendant has not paid or allowed the same or any com-

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mission on the said cargo to the plaintiffs or their agents, whereby the plaintiffs were obliged to allow and pay to their agents a compensation in respect thereof.

Demurrer and joinder therein.

*Phipson*, in support of the demurrer.—The alleged custom is not admissible to vary the written contract. By the terms of the charter-party “the ship is to be consigned to the charterer's agents in China, free of commission on this charter.” That relates to the outward voyage only. But it is sought by the custom to introduce a new stipulation into the charter-party, viz., that the consignee's agents are entitled to procure a homeward cargo, and receive commission on that cargo. If it be said that the custom explains the meaning of the word “consigned,” as including both the outward and homeward cargo, then all the stipulations in the charter-party must be applied to such a contract, and consequently the homeward as well as the outward voyage is “free of commission.” The authorities relating to the subject of annexing incidents to written contracts by evidence of established usage, are collected in *Taylor on Evidence*, p. 914, 2nd ed.

*The Court* then called on

*Tomkinson*, contrà.—The contract was made with reference to the custom. In *Robertson v. Wait*(a) the charter-party contained a clause that the vessel should be consigned to the plaintiff's agents “on the usual and customary terms,” and it appeared in evidence that one of those terms was, that the agents might procure the homeward freight for a certain commission. *Syers v. Jonas*(b) decided, that in an action for the price of tobacco, evidence is admissible to

(a) 8 Exch. 299.

(b) 2 Exch. 111.

shew that by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes. The words "to be consigned to the charterer's agents," must be construed by mercantile usage; and if they had stood alone without the words "free of commission," some profit to the agent would be implied, and then evidence might be given of the custom. [*Alderson*, B.—The custom does not explain any part of the contract with respect to carrying the goods from London to China, but makes a new contract.] It is an incident of the contract that the charterer's agent should derive some profit from the consignment, but the mode of payment depends on mercantile usage. In this case the agent is to procure a homeward cargo, and receive commission on that cargo; the owners are, however, at liberty to procure a cargo through some other agency, provided they pay the charterer's agent the usual broker's commission. [*Alderson*, B.—*Syers v. Jonas* (*a*) was a contract for the sale of tobacco, in which case it must be ascertained what is sold and what is bought, and incidental to that is introduced a custom to sell by sample: that tells what is sold and what is bought. Evidence of custom is admissible to annex incidents to written contracts, that is, something which is tacitly in the contract itself; but that principle cannot apply to a case like this, where the voyage has been performed and the contract is at an end.] The defendant not only stipulated to carry the cargo but to do a further act, viz., to allow the plaintiffs agents to earn commission on the homeward cargo. The word "consign" is a mercantile term, and must be explained by mercantile usage. In *Broune v. Byrne* (*b*), the bill of lading expressed that the goods should be delivered at Liverpool to the order of the consignee or his assigns, "he or they paying freight for the

(*a*) 2 Exch. 111.

(*b*) 3 E. & B. 703.

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said goods five-eighths of a penny sterling per pound, with prime and average accustomed," and evidence was admitted of a mercantile custom at Liverpool to deduct three months' interest or discount from the freight. Again, in *Cuthbert v. Cumming* (a), where the contract was to load at Trinidad a full and complete cargo of sugar and molasses, evidence was admitted of a custom at Trinidad to load sugar in hogsheads and molasses in puncheons. This charter-party provides that a commission of 5*l.* per cent. shall be paid to the London agents "on this charter," that is, on the outward voyage. That explains the meaning of the terms "free of commission *on this charter.*" There is a distinction between consigning the ship and consigning the goods.

POLLOCK, C. B.—Our judgment must be for the defendant. The substance of Mr. Tomlinson's argument is, that the word "consigned" may be construed by mercantile usage to mean not only what it imports, but also to impose on the defendant an obligation not mentioned in the contract. I do not know where we should stop if we permitted evidence to extend the plain language of a charter-party. It is usual for a brewer to sell beer to publicans to whom he has granted leases, but evidence could not be given of a usage, that because the publican pays the brewer rent he must buy of him beer. No doubt, in modern times, the original strictness has been departed from, and evidence of usage has been admitted to explain particular expressions, but not to vary the contract. *Syers v. Jonas* shews that so long as the custom is merely incidental to the performance of the contract it may be given in evidence. The case of *Brown v. Byrne* went a long way, but still it cannot be denied that the deduction of three months' discount was

(a) 16 Exch. 809; 11 Exch. 405.

something incidental to the contract. Here it is sought not to explain the contract by the custom, or to add to it some incidental matter not inconsistent with what is expressed, but to impose on the party who has entered into one contract another and a different obligation, and because he has agreed to consign the ship to the charterer's agents on the outward voyage, to make him liable to pay the agents' commission on the homeward cargo. If that could be done where is it to stop? If, because the vessel is consigned to the charterer's agents "free of commission" on the outward voyage, they are entitled to commission on the homeward cargo, whether they have procured it or not, why should they not also be entitled to commission on the next voyage? I should have thought the custom unreasonable; but, at all events, there is no authority for saying that a written instrument can be varied by parol evidence of such a custom. This is not explaining a contract by evidence of something incidental to it, but introducing another and a different contract.

BRAMWELL, B.—I am of opinion that the declaration is bad. Mr. Tomlinson's argument is, that he is only expanding or explaining what is contained in the word "consign." He says its meaning is this, "that the defendant will consign the ship to the plaintiffs agent *on the usual terms*. If the defendant does that, he complies with his contract; if he does not, he commits a breach of contract, and the plaintiffs have a right of action against him. The substance of the contract, therefore, is this: the owner agrees to consign the ship to the charterer's agents on the usual terms, which are, that the agents have a right to procure the homeward cargo, and they are entitled to be paid a commission, if the owner, without any default on their part, procures such cargo. The declaration alleges no

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breach of that obligation. The allegation is, that although the plaintiffs agents, as consignees, performed their duty free of commission on the outward voyage and cargo, and were ready and willing to procure a charter or cargo from Hong Kong, yet the defendant would not permit them to procure such charter or cargo, and without any default on their part, procured a cargo otherwise than through their agency; that the commission thereon amounted to a large sum, which the defendant has not paid. That is not a breach of the duty to consign the ship on the usual terms. Suppose the custom had been stated in the charter-party as part of the defendant's duty, what would have been the proper breach?—That the defendant did not consign the ship on the usual terms, but that would not be proved by shewing that although the defendant did consign the ship on these terms, yet he did not pay the agent's commission on the homeward cargo. So that assuming every thing in favour of Mr. Tomlinson's argument, that the charter-party is to be read as if it contained the usual terms, and that those terms are expanded on the face of the declaration, the proper breach would be, that the defendant did not consign the ship on those terms, not that, although he did consign on those terms, the defendant did not pay the agent's commission; therefore I cannot see that the point is raised by Mr. Tomlinson's argument. But supposing, as he contends, that the declaration is to be read as alleging not only a contract to consign the ship on the usual terms, but also to pay the charterer's agents certain commission, then inasmuch as the custom to consign on those terms adds an additional obligation to the charter-party, the declaration is also bad. In the case of *Robertson v. Wait* the charter-party contained the words, "the vessel to be consigned on the usual and customary terms;" therefore the declaration must be taken to have stated that the charterer's

agents were entitled to certain commission, and the breach in that case was what I surmise should have been here, viz. that the defendants consigned the vessel on other than the usual and customary terms. The whole scope of this declaration shews a consignment upon the usual terms; but it is insisted that those terms have not been complied with. I find nothing in the charter-party which shews that the plaintiff has a right to complain of that. It seems to me that the argument on the part of the plaintiff does not raise the question, and even if it did, I agree with what has been said as to the custom adding a new term to the contract; and, moreover, I doubt whether there is any such custom giving the plaintiff a right to sue for his agent's commission. For these reasons I think that the declaration is bad, and that the defendant is entitled to judgment (a).

Judgment for the defendant.

(a) *Alderson, B.* had left the Court.

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ELIZABETH GOATE, Executrix of JOHN GOATE, v.  
T. R. GOATE.

April 25.

**T**HIS was an action to recover money due to the testator for goods sold by him to the defendant.

Plea.—The Statute of Limitations.

On the trial before *Pollock, C. B.*, at the sittings in London after Michaelmas Term, it appeared that the plaintiff's testator left two wills, one dated in 1842 and another in 1853. The latter will was proved by the executor named in it, but was afterwards disputed, and ultimately set aside. The defendant, who was indebted to

charge was inoperative in itself, and was given upon a condition which the defendant failed to observe.

An admission of a debt made to a person who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgement of the debt to prevent the operation of the statute of limitations, though the dis-

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the testator for goods sold more than six years ago before action brought, being desirous of raising money on a legacy of 50*l.* given to him by that will, applied to the plaintiff, to whom the debts due to the testator were bequeathed by that will, to give him a discharge of his debt. This she consented to do, on his allowing a claim which he stated that he had against the testator, and on the understanding that he would not dispute the will.

The following memoranda were signed by the plaintiff and the defendant:—

Stoke Ferry.

|                                                               |               |
|---------------------------------------------------------------|---------------|
| Balance of debt left unpaid and due to the late               | £ d. s.       |
| Mr. John Goate from Turner R. Goate . . .                     | 56 1 8        |
| C <sup>r</sup> per bill received in full of all demands . . . | <u>14 9 0</u> |
| Total . . . . .                                               | £41 12 8      |

The above sum of £41 12*s.* 8*d.*, to which I am entitled, I hereby discharge and present as a voluntary gift to the said Turner Rowland Goate. As witness my hand, this 3rd day of December, 1853.

Elizabeth Goate.

Stoke Ferry.

The executors of the late Mr. John Goate.

Dr. to Turner R. Goate.

|                                       |         |
|---------------------------------------|---------|
| 1847. Bill for work . . . . .         | £1 15 0 |
| Mr. Hebgin's bill . . . . .           | £1 13 6 |
| 1849. Mr. Stewart's bill, &c. . . . . | &c.     |
| Total . . . . .                       | £14 9 0 |

December 3, 1853. Settled the above, in full of all demands upon the late Mr. John Goate. Balance due to the late Mr. John Goate £56 1*s.* 8*d.* Credit per account £14 9*s.* Balance £41 12*s.* 8*d.*

Turner Rowling Goate.

The defendant, as soon as he had raised the money on

his legacy, took proceedings to set aside the will of 1853, and succeeded in doing so. The plaintiff then proved the will of 1842. It was contended, on the part of the defendant, that there was no sufficient acknowledgment to take the case out of the Statute of Limitations. The learned Judge was inclined to think the acknowledgment sufficient, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him.

*Lush* having obtained a rule in pursuance of such leave,

*Phipson* now shewed cause. The defendant states an account. He says, "I owe 56*l.*, the estate owes me £14 9*s.*" The admission of the balance due is sufficient to take the case out of the statute. The Court can see that the discharge is inoperative. *Partington v. Butcher* (*a*). [*Bramwell, B.*—Since the case of *Tanner v. Smart* (*b*) that case cannot be considered law.]

**POLLOCK, C. B.**—The rule must be absolute. The two documents taken together shew that though there was an admission of the debt, it was with the intention, on both sides, that the debt never should be paid.

**ALDERSON, B.**—I am of the same opinion. One party says, "I never will claim," the other never intended to pay.

**BRAMWELL, B.** concurred.

Rule absolute.

(*a*) 6 Esp. 66.

(*b*) 6 B. & C. 603.

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April 21.

HUTTON v. WHITEHOUSE.

A British subject residing out of the jurisdiction, having been served with a writ of summons, under the 18th section of the Common Law Procedure Act, 1852, and not having appeared, a Judge's order was made that the plaintiff should be at liberty to proceed. Judgment was signed on the 28th of November. The defendant on the 12th March, applied to set aside the proceedings on the ground that the cause of action did not arise within the jurisdiction of the Court. Held, that the Judge's order was not void, and the defendant not having come within a reasonable time, the rule was refused.

THIS was an action on a promissory note made by the defendant in Guernsey. A writ of summons, issued in pursuance of the 18th section of the Common Law Procedure Act, 1852, (bearing the indorsement for service on a British subject out of the jurisdiction of the superior Courts, but not any special indorsement of the nature or particulars of the plaintiff's claim,) was served on the defendant in Guernsey on the 8th of November, 1855. The defendant not having appeared, *Martin, B.*, at Chambers, made an order that the plaintiff should be at liberty to proceed. Judgment was signed on the 28th of that month. The defendant had no notice of the proceedings from the time of the service of the writ until execution was levied on him by process out of the Court in Guernsey. A summons was then taken out to set aside the proceedings, on the ground that the cause of action did not arise within the jurisdiction of this Court. The summons was heard before *Crompton, J.*, at Chambers, on the 12th of March, when the learned Judge refused to make any order, upon the ground that the defendant should have applied to the Court at an earlier period.

Field now moved for a rule to shew cause why the judgment, and all subsequent proceedings, should not be set aside with costs.—The writ issued against the defendant, a British subject, residing out of the jurisdiction of the superior Courts; and the plaintiff did not prove a cause of action which arose within the jurisdiction, or that the action was in respect of a breach of contract made within the jurisdiction. The writ served on the defendant was

regular (*a*) ; and he applied to a Judge at Chambers as soon as he was aware of the proceedings in the Court in Guernsey. The judgment is not merely irregular. The learned Judge, in making the order that the plaintiff should be at liberty to proceed, had no jurisdiction. If a Judge makes an order for an arrest under 1 & 2 Vict. c. 110, which he is not authorized to make, a writ issued under it is a nullity. The other party has not been prejudiced by the delay : *Cocker v. Tempest* (*b*).

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MARTIN, B.—No rule will be granted. The defendant should have come within a reasonable time. By Reg. Gen. Hil. 1853, 135, no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time. By the 18th section of the Common Law Procedure Act, 1852, power is given to the Court or a Judge, to direct that the plaintiff shall be at liberty to proceed with the action on being satisfied that the cause of action arose within the jurisdiction. If the Judge is satisfied, surely there is jurisdiction. It is no new jurisdiction, merely a new process.

POLLOCK, C. B., and ALDERSON, B., concurred.

Rule refused (*c*).

(*a*) See *Forbes v. Smith* 10 Exch. 717. (*c*) See *Brough v. Eisenberg*, 14 Q. B. 446.

(*b*) 7 M. & W. 502.

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April 16.

**MUMFORD and Others v. THE OXFORD, WORCESTER
AND WOLVERHAMPTON RAILWAY COMPANY.**

In order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore, *Held*, that a reversioner could not maintain an action against a railway Company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rent.

THE declaration alleged that the defendants, being possessed of certain engine sheds and workshops near to the messuage occupied by the plaintiffs' tenant, caused to be made therein loud hammering noises, to the great nuisance of the tenant and all persons being in the messuage, whereby the messuage became depreciated in value, the tenant refused to remain, and the plaintiffs were injured in their reversionary estate.—Plea, not guilty.

At the trial before *Bramwell*, B., at the Worcester Spring Assizes, it appeared that the plaintiffs were the owners of the equity of redemption in the premises in question, the legal estate being vested in a mortgagee. The plaintiffs had let the premises, but in consequence of the noises the tenant gave notice to quit, and the plaintiffs could not afterwards let them, except at a reduced rent. The learned Judge told the jury that there was no evidence of an injury to the reversion, and that even if there was, the plaintiffs, being merely the owners of the equity of redemption, had no such reversion as would entitle them to maintain this action, and under his lordship's direction the jury returned a verdict for the defendants.

Keating now moved for a rule to shew cause why the verdict should not be set aside and a new trial had, on the ground of misdirection.—The plaintiffs' reversion was affected. The acts of the defendants tended to establish a right, and a reversioner may sue for wrongful acts which tend to create a right against him. The case of *Tucker v.*

Newman (*a*) shews that if light is obstructed it is an injury to the reversion. [*Alderson*, B.—There the erection itself was a nuisance in its nature permanent. Here it is merely the use of the shed that occasions the injury.] It should have been left to the jury to say whether there was an injury to the plaintiffs' right, according to the doctrine laid down by Lord *Tenterden* in *Young v. Spencer* (*b*). [*Pollock*, C. B.—There is a distinction between a nuisance and an easement (*c*). No right can be gained by continuing a public nuisance.] Here there is a permanent injury. The test is, if the reversioner wanted to sell this reversion would he get a less price for it (*d*)? The Court of Queen's Bench, in *Croft v. Lumley* (*e*), lately held that the shutting up of the Opera House lessened the value of the reversion.

POLLOCK, C. B.—There will be no rule. The hammering and noises may be stopped and the shed removed at any time. In order to give a right of action to a reversioner the injury must be of a permanent character. It was so laid down in *Baxter v. Taylor* (*f*), where it was held that an action would not lie by a reversioner against a stranger for entering on land held by a tenant on lease, though such entry was in the exercise of an alleged right of way. *Young v. Spencer* (*g*) was cited, but all the Court thought that the case had no application. *Young v. Spencer* was an action against the leasee for years for opening a new door, whereby the house was not in any degree weakened or injured, and it was held that it ought to have been left to the jury to say whether there was not an injury to the

(*a*) *Tucker v. Newman*, 11 A. & E. 40. See *Shadowell v. Hutchinson*, M. & M. 350; S. C. 4 C. & P. 333.

(*d*) 1 Saund. 322 e, note to *Pomfret v. Ricraft*.

(*b*) 10 B. & C. 152.
(*c*) See however *Fight v. Thos-*
nes, 10 A. & E. 590.

(*e*) See 5 E. & B. 648, 674.

(*f*) 4 B. & Ad. 72.

(*g*) 10 B. & C. 145.

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plaintiffs' reversionary right. Lord *Tenterden* said that it seemed to be clearly established that if any thing be done to destroy the evidence of title an action is maintainable by the reversioner. But in *Baxter v. Taylor* the Court denied the correctness of that opinion. *Parke*, J. said: "to entitle a reversioner to maintain this action it is necessary for him to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied by a claim of right, is not necessarily injurious to the reversionary estate, and what Lord *Tenterden* said in *Young v. Spencer* must be construed with reference to the subject-matter then under consideration—an action on the case in the nature of waste by a reversioner against his tenant." It is not a question for the jury whether the injury is of a permanent nature. There is some mistake as to the supposed decision in *Croft v. Lumley*. The reversioner has no right that a particular business shall be carried on in the demised premises. Moreover, *Croft v. Lumley* was an action for breach of covenant, not case for an injury to the reversion.

**ALDERSON**, B.—A reversioner cannot maintain an action for an injury not necessarily permanent. This injury is not, in its nature, permanent. Till the reversioner comes into possession he is not prejudiced. There was no evidence to be left to the jury, and nothing to lead to the inference that the injury would be permanent except the presumed intention of the defendants to continue the nuisance.

**BRAMWELL**, B.—I am of the same opinion. The action should have been brought by the tenant. In point of law, there could not have been the alleged damage to the re-

version; therefore there was nothing to leave to the jury. In fact, I doubt whether an action can be properly said to be sustainable for an injury to a reversionary interest. Suppose a building to be pulled down, the owner of the building is *directly* injured, and if he is not in possession it is necessary to state his title to shew how he is affected. Mr. Keating says that the noises diminished the value of the premises. I do not agree to that. If the tenant is damaged to the value of 10*l.*, he will get 10*l.* compensation. The real injury results from the presumed intention to continue the noise. The premises are not depreciated in value by any thing that has been actually done.

Rule refused (*a*).

(e) See *Dobson v. Blackmore*, 9 Q. B. 991; Yearbook 13 H. 7, 26 a. b.; 9 Rep. 59 a.

The Court gave no opinion on the question whether the plaintiffs,

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#### COLEMAN v. SIR W. FOSTER, Bart.

*April 28.*

#### DECLARATION for breaking and entering plaintiff's theatre.

Pleas (inter alia).—Thirdly: that Rix and Cooper being trustees for themselves and the other proprietors, demised the theatre for three years, from July 6, 1855, to Sidney, upon the terms, amongst others, that Rix, Cooper, and the other proprietors should have free liberty and licence of admission to the theatre: that Sidney entered and became tenant subject

A licence is determined by an assignment of the subject matter in respect of which the privilege is to be enjoyed.

By lease not under seal, R. and C., trustees on behalf of themselves and the other proprietors of a theatre, de-

mised it to S. for three years, reserving to themselves and the other proprietors free liberty of admission to the theatre. S., by lease not under seal, let the theatre to the plaintiff for two nights, subject to the terms on which he held the theatre.

Held, that the licence was determined, and that an action of trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theatre during his tenancy.

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to those terms: that it was afterwards agreed between the plaintiff and Sidney that the plaintiff should have the use of the theatre for two nights: that the plaintiff knew at the time of the agreement the terms under which Sidney held: that plaintiff became possessed under the agreement: that defendant was one of the proprietors, and as such proprietor entered.

Fourthly.—That the theatre was the soil and freehold of Rix and Cooper, who demised to Sidney: and that the defendant entered as servant of Sidney.

Replication to third plea.—That at the time of the demise to Sidney, Rix and Cooper were jointly seized or possessed, and that their estate is not determined; that defendant had only an equitable interest; that defendant did not demise to Sidney; that the demise to Sidney was not by deed, nor did Sidney, at any time, grant any right of admission to the defendant by deed or by any means effectual to pass such right; that the plaintiff was lawfully possessed for a term, and had no notice of the licence until after the making of the agreement.

Replication to fourth plea.—That after Sidney entered, plaintiff became lawfully possessed by virtue of a demise to him made by Sidney; and that the supposed authority to enter was revocable by Sidney without the defendant's consent.

Rejoinder to replication to third plea.—That the demise to Sidney was not under seal, and was subject to the terms on which Sidney had hired the theatre, mentioned in the third plea.

Rejoinder to replication to fourth plea.—That the demise by Sidney was a demise not under seal, and was subject to the authority, command, licence and permission which were given by Sidney to the plaintiff before the

demise, and which were not revoked by Sidney before, at, or during the demise.

Demurrer to the rejoinders, and joinder therein.

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*Raymond*, in support of the demurrer.—There is no privity between the plaintiff and the defendant, and a fortiori no licence from the plaintiff to the defendant. The instrument of demise contains nothing which gives any interest to the defendant. The alleged right of entry does not amount to a reservation or exception out of the demise. The case of *Wickham v. Hawker* (*a*) shews that such an interest cannot be reserved to a stranger. It is no part of the estate—nothing more than a mere contract. There was no grant of an easement, for there was no deed. If there was a valid parol licence by Sidney it would not give the defendant authority to enter the plaintiff's land after the demise to him by Sidney. *Wallis v. Harrison* (*b*).

*Worlledge*, contrâ.—Enough appears to excuse the defendant's trespass. Could Sidney, without revoking his licence, treat any proprietor as a trespasser? Sidney held the theatre of two of the proprietors on the terms that he was to let them and their co-proprietors enter to see all performances. That is a good licence by Sidney. The plaintiff took the premises subject to the licence by Sidney, and he cannot treat the defendant as a trespasser until he has done some act to notify that he has determined the licence. [Bramwell, B.—You would say that the licence was not binding, but that it was sufficient to excuse the trespasses. Alderson, B.—The permission was determined by the demise.]

*POLLOCK*, C. B.—In order to be an excuse for the trespass the alleged liberty of admission must be a licence, or it is

(*a*) 7 M. & W. 63.

(*b*) 4 M. & W. 538.

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nothing. It conveys no interest whatever. If a man gives a licence and then parts with the property over which the privilege is to be exercised, the licence is gone. A licence is a thing so evanescent that it cannot be transferred.

ALDERSON, B., concurred.

BRAMWELL, B.—Mr. *Worledge* put the case very properly. If a man has a field in which he had been in the habit of permitting people to play at cricket, it may be that he cannot treat them as trespassers until after notice to them not to come there any longer. But I cannot make out that the plaintiff ever gave any licence; on the contrary, I find that at the time he took the premises he did not know of the licence by Sidney. The rejoinder is bad, and I think the third plea is also bad.

Judgment for the plaintiff (*a*).

(*a*) See *Roffey v. Henderson*, 17 Q. B. 574; *Perry v. Fitzhowe*, 8 Q. B. 757.

*April 28.* MOODY and Another *v.* THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF WELLS, in the County of Somerset.

The owner of lands charged with a fee-farm rent, payable to a purchaser from the Crown under statutes 22 C. 2, c. 6, and 23 C. 2, c. 24, having redeemed the land tax

BY consent and order of a judge, pursuant to the Common Law Procedure Act, 1852, the following case was stated for the opinion of this Court without pleadings.—

In pursuance of the provisions of the statutes passed in the sessions of Parliament helden in the 22nd year of the reign of King Charles 2, intituled “An Act for advancing

chargeable on the lands out of which the fee farm rent issues, is entitled under the land tax Acts, to deduct four shillings in the pound from the rent so payable.

the Sale of Fee-farm Rents and other Rents;" and in the 22nd and 23rd years of his reign, intituled "An Act for vesting certain Fee-farm Rents and other Small Rents in Trustees," Francis Lord Hawley, Sir Charles Harbord, Sir William Haward, Sir John Talbott, and William Harbord (the persons so named in the last mentioned statute), were before and at the time of the making the grant herein-after mentioned, seized in their demesne as of fee of and in the yearly fee-farm rent of 119*l.* 6*s.*, before then vested by forfeiture in, and so payable to, his Majesty, and issuing out of certain charity lands belonging to the said Dean and Chapter, but which had not been originally granted to or reserved by the Crown; and being so seised duly granted the same, so that the said rent of 119*l.* 6*s.* has been from time to time duly granted and assigned, until all the estate and interest therein was, more than six years before the commencement of this suit, duly vested in the plaintiffs, who then became and still are seised in fee of and in the said rent; and the said lands out of which the rent issues and is payable have continued to belong to the said Dean and Chapter for the time being, and still belong to the defendants.

On the 29th of September, 1854, 119*l.* 6*s.*, one year's rent, was payable to the plaintiffs, and the same was paid by the defendants to the plaintiffs, with the exception of 23*l.* 16*s.*, part thereof, which the defendants then claimed, and still claim, to deduct and to be allowed out of that year's rent, under the provisions of the Land Tax Acts.

On the 17th of November 1810, the 18th of December 1811, the 14th of December 1812, the 30th of January 1826, the 15th of March 1828, and the 12th September 1829, the land-tax chargeable under the statutes then in force relating thereto, upon a portion of the lands of the said Dean and Chapter, out of which the said fee-farm

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rent was issuing, was redeemed by the Dean and Chapter under the statutes then in force relating to such redemption.

The deduction now claimed has always been made and allowed, but for many years the rent has been successively the property of females, who have taken what was paid them without raising any question.

The said deduction of 23*l*. 16*s.* is claimed to be made by the defendants yearly, at the rate of 4*s.* in the pound, of the said rent of 119*l*. 6*s.*; but it is not so much of a pound rate which has been taxed or assessed upon the said lands out of which the said rent of 119*l*. 6*s.* issues, and to the payment of which the same lands are subject and liable as a like rate for that rent of 119*l*. 6*s.* should or would by a just proportion amount unto, but 23*l*. 16*s.* is in excess of such just proportion.

The question for the opinion of the Court is, whether the defendants were and are entitled to deduct, retain, or be allowed out of the said rent of 119*l*. 6*s.* so due on the 29th of September 1854, the said sum of 23*l*. 16*s.*; and if not that sum, whether they were and are entitled to deduct such just proportion as aforesaid. If the Court is of opinion in the affirmative of the first of the above questions, judgment herein is to be entered for the defendants with costs. If in the negative of the first and the affirmative of the second, judgment is to be entered for the plaintiffs for such a sum as shall be assessed by a person to be appointed by the parties, with costs. If in the negative of both, then for the plaintiffs for the sum of 23*l*. 16*s.*, with costs.

*H. Bullar*, for the plaintiffs.—The 38 Geo. 3, c. 5, an Act "for granting an aid to his Majesty by a land tax, to be raised in Great Britain for the service of the year 1798;" enacts, by section 3, "that all manors, messuages, lands and

tenements, and all hereditaments, and all persons, &c., having any such manors, &c., shall be charged with as much equality and indifference as possible by a pound rate for or towards the several sums by that act imposed upon the several counties, &c. thereby charged therewith, so that by the rates to be taxed upon the said manors, &c., the full and entire sums thereby appointed to be raised shall be completely and effectually levied and collected, and paid into the receipt of his Majesty's exchequer." Section 5, after reciting that "many of the manors so intended to be charged are incumbered with or are subject to the payment of fee-farm rents or other rents, by reason whereof the true owners do not receive to their own use the full yearly value for which they are chargeable by a certain pound rate," enacts, "that it shall be lawful for the owners of such manors, &c., to abate out of every such fee-farm or other rent, so much of the pound rate as a like rate assessed for every such fee-farm rent shall by a just proportion amount to," and the deduction is to be allowed by the auditors on receiving the residue of the moneys payable. By section 30, auditors who receive fee-farm rents or other chief rents due to his Majesty, or any person claiming by any grant or purchase from or under the Crown, are to allow four shillings for every pound of such rents. By section 31 such deduction is not to exceed the sum assessed upon the whole estate out of which the fee-farm rent issues. The 38 Geo. 3, c. 60, makes perpetual so much of the duty as was payable in respect of lands and hereditaments. The tax on pensions and payments by the Crown was dealt with by the 39 Geo. 3, c. 3, and subsequently by annual Acts. The 2nd and 3rd sections of the last-mentioned Act provided that the four-shilling duty should continue payable. But annual payments issuing out of land are excepted from the operation of this Act.

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*Lush*, for the defendants.—The plaintiffs claim to have the benefit of the defendant's redemption of the land tax, though they have paid nothing towards the redemption. But the defendants were entitled to deduct the four-shilling duty by 38 Geo. 3, c. 5, s. 30, and that power was kept alive by the 38 Geo. 3, c. 60, s. 1.—He was then stopped by the Court.

*Bullar*, in reply.—The preamble of the 38 Geo. 3, c. 60, shews that it applies only to such land-tax as is thereby made subject to redemption or purchase; and as the four-shilling duty, mentioned in 38 Geo. 3, c. 5, ss. 30, 31, is not made redeemable, it is not made perpetual, but expired with the annual act, 38 Geo. 3, c. 5. This appears also from stat. 42 Geo. 3, c. 116, ss. 1, 3. [*Lush* referred to 42 Geo. 3, c. 116, ss. 35, 36.] The four-shilling duty could not have been redeemed under stat. 42 Geo. 3, c. 116. The 35th section empowered the owner of rents, who could not apply to have the land-tax redeemed because he was not assessed, to go to the assessor to adjust the proportion of the tax which ought to be borne by him in respect of such rents. The owner of the land, in a case like the present, should have had his proportion assessed, and redeemed it. Nothing was intended to be made redeemable except the just proportion payable by the owner of the land. There is no provision for redeeming this deduction. At any rate, only a just proportion can now be deducted. The 127th section of 43 Geo. 3, c. 116, enables parties who have redeemed the land-tax to deduct the just proportion, and no more.

*POLLOCK*, C. B.—I am of opinion that there must be judgment for the defendants. The case is tolerably free from doubt—as free as any question can be, depending on a

comparison of so many acts of parliament. The land-tax was first imposed in the reign of William the Third, and continued by a series of annual Acts, which are not to be found in the quarto edition of the statutes. The last of these Acts was the 38 Geo. 3, c. 5, and the 30th section (a clause which I take for granted had existed in all previous Acts upon the subject) imposed a rate of four shillings in the pound on all payments to the King, and to those who claimed under the Crown. Then came the Land-tax Redemption Acts, which made provision for the redemption of the land-tax. At that time all persons entitled to fee-farm rents granted by the Crown received them subject to a deduction of four shillings in the pound. It is true, that there is no provision in the Land-tax Redemption Acts enabling the owners to redeem this deduction, so that by purchasing stock they might get rid of the payment of the tax. The 3rd section of the 42 Geo. 3, c. 116, provided that the powers of the 38 Geo. 3, c. 5, not thereby varied, should continue in force. Mr. *Bullar* says this does not apply,—that this four-shilling rate is not made redeemable, and has therefore expired. But it may be answered that it is perhaps rather a deduction than a tax, or that it is made redeemable, but the necessary machinery was not provided. Section 35 was passed to enable the land-tax commissioners to assess the tax on fee-farm rents. Afterwards the Dean and Chapter bought up the whole land-tax. Whether the deduction is a thing separate from the land-tax we need not determine. The Dean and Chapter cannot be in a worse situation than if they had not redeemed; and if they had not redeemed they might have deducted this money.

**ALDERSON, B.**—It is clear that, according to the true construction of the Acts, this deduction must be allowed. What was the situation of the parties when the 38 Geo. 3,

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c. 60, passed? All the country was originally rated equally at four shillings in the pound. The variation in the rate has arisen from change of circumstances: one part of the country prospered, another has declined. The tax has thus become unequal. There was no real difference in the proportion when the tax was assessed, though there was a difference in the mode of assessment. Fee-farm rents and payments to the Crown were subject to a fixed payment of four shillings in the pound. The whole tax was paid by the party in possession of the land. He then deducted a proportion from the owner of the rent, and there seems to me no reason why he should not still do so.

**BRAMWELL, B.**—I am of the same opinion. Mr. *Bullar* attempts to create a difficulty by shewing that this is a tax for the redemption of which no provision has been made. No doubt the Act in question was meant to apply in general to such land-tax only as was intended to be made redeemable. At the time of the passing of this Act the owner of the rent got only sixteen shillings in the pound. He now seeks to make the person who bought up the whole land-tax pay the other four shillings. A power to make the deduction was given by the 30th and 31st sections of 38 Geo. 3, c. 5. Mr. *Bullar's* argument is, that the tax is irredeemable. Possibly that may be so. If these particular fee-farm rents were made redeemable, the only effect would be that the owner of the rent would get twenty shillings instead of sixteen shillings in the pound from the owner of the land. The legislature may have been willing to encourage redemption by landowners. I am confirmed in that notion by the 42 Geo. 3, c. 116, ss. 35, 36, which is applicable to other fee-farm rents, namely those which fluctuate in value.

Judgment for the defendants.

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**NIXON v. THE KILKENNY and GREAT SOUTHERN and  
WESTERN RAILWAY COMPANY.** *April 29.*

**UNTHANK** had obtained a rule calling on one Brownlow to shew cause why a writ of scire facias for obtaining execution on the judgment obtained by the plaintiff in this cause, should not issue against him as one of the shareholders in The Kilkenny and Great Southern and Western Railway Company.

The affidavits in support of the application stated, that the Company was incorporated by the 9 & 10 Vict. c. ccclx. in which "The Companies Clauses Consolidation Act 1845" is incorporated: that final judgment was recovered by the plaintiff against the Company for 505*l.*; that a writ of fieri facias issued to the sheriffs of London, commanding them to levy on the goods and chattels of the Company, and that the sheriffs returned nulla bona; that Brownlow was a shareholder in the Company, and had been personally served with notice of the motion. The affidavit of the plaintiff also contained the following statement:—"That the defendants had not at the date of the said judgment, nor have they now, nor have they at any time since the said judgment, had any lands, chattels, goods, or effects in England, Ireland, or elsewhere, whereon the plaintiff could or can levy the amount of the said judgment, or any part thereof."

An application, under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 36, for leave to issue execution against a shareholder on a judgment against the Company, was founded on affidavits which stated that a f. fa. issued against the Company and was returned nulla bona; that the Company had not at the date of the judgment, or since, any lands, chattels, goods or effects in England, Ireland or elsewhere, whereon the plaintiff could levy the amount of the judgment or any part thereof. Held sufficient.

**Gray** shewed cause.—The affidavits are insufficient. The application is founded on the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 36, which enacts, that "if any execution, either at law or in equity, shall have

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been issued against the property or effects of the Company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open Court after sufficient notice in writing to the persons sought to be charged," &c. The plaintiff is bound to satisfy the Court that he has used due diligence to obtain payment from the Company. He states that a fieri facias issued which was returned nulla bona, but there is no affidavit of the sheriff's officer shewing what was done under the writ. The plaintiff also states that the Company has no property, but he ought to have shewn the grounds for that statement, or at least what inquiries he made on the subject. In *King v. The Parental Endowment Assurance Company (a)*, *Parke*, B., said: "The Court ought not to allow execution to issue against a shareholder unless they are satisfied that due diligence has been used to obtain satisfaction of the judgment by execution against the Company. Now what has been done for that purpose is a matter peculiarly within the plaintiff's knowledge, and therefore he is bound to shew to the Court that he has used all reasonable exertions. Here the principal objection is, that although a writ of fieri facias issued, it does not appear what was done under the writ. It may be that the return of nulla bona was at the instance of the plaintiff himself. The affidavits are not sufficient to satisfy me that all has been done which might have been done, and consequently due diligence has not been used." [Pollock, C.B.—It would serve no purpose

(e) 11 Exch. 443.

to require an affidavit of the sheriff's officer, when it clearly appears that the Company has no property whatever.]

Unthank appeared in support of the rule, but was not called upon.

POLLOCK, C. B.—The rule must be absolute. The case of *King v. The Parental Endowment Assurance Company* is distinguishable. There the affidavits stated that a fieri facias issued which was returned nulla bona; that the chief office of the Company was closed, and that the deponent believed that any writ of execution against the property and effects of the Company would be wholly unavailing. But there was no affidavit, as in this case, that the Company had no property whatever, real or personal, on which execution could be levied.

MARTIN, B.—It is distinctly sworn that the Company has no property of any kind in England, Ireland, or elsewhere, and that is surely sufficient.

Rule absolute.

GWYN v. HARDWICKE.

April 24.

THIS was an action for a trespass upon certain lands of the plaintiff, in the parish of Tasburgh, in the county of Norfolk.

An Inclosure Act empowered Commissioners, with the concurrence of two

justices, to stop up, divert or turn, and to direct to be discontinued any public road or footpath through any part or parts of the lands and grounds in the parish of T. which to the Commissioners should appear useless; subject to an appeal to the quarter sessions. The Commissioners and two justices made an order stopping up a public footpath in the parish of T. which was continued as a footpath into the parish of S., whereby the part in the latter parish became useless as a public way.

Held, that the Commissioners had power to stop up the part of the footpath in the parish of T., and that if any injury was thereby done, the remedy was by appeal.

Sensible, that the part of the footway in the parish of T. still remained a public way, though a cul-de-sac.

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Plea.—A right of way over the closes in which, &c. for all persons on foot. Issue having been joined thereon, the following case was, by consent and order of a Judge, stated for the opinion of this Court:—

The plaintiff was the occupier of two closes of land in the parish of Tasburgh, in the county of Norfolk, called “The First Nortons” and “The Further Norton.” Prior to and at the time of the Inclosure Act hereinafter mentioned, a public footpath in Tasburgh led across the north-west end of the closes in question over lands in Saxlingham parish, towards another highway situate also in Saxlingham. By an act of Parliament passed in the year 1813 (53 Geo. 3, c. lxvi. (a),) it was enacted “that it shall and may be lawful to and for the said commissioners, and they are hereby authorized and empowered (with the concurrence and order of two Justices of the Peace for the said county of Norfolk, acting in and for the division in which the road or roads, footpath or footpaths to be stopped up shall be situate, and not interested in the repair of such road or roads, footpath or footpaths) to stop up, divert or turn, and to direct to be discontinued any public road or roads, footpath or footpaths, through any part or parts of the lands and grounds in the said parish of Tasburgh, which to the said commissioners shall appear useless or unnecessary: Provided always, that such order so to be made shall be subject to an appeal to the Quarter Sessions, in the like manner, and under the same forms and restrictions, as if the same had been originally made by such justices as aforesaid.”

In the year 1815 the said commissioners and two justices made an order for stopping up the footpath in question. The part of the footpath in Tasburgh, which was stopped up, was continued as a footpath into Saxlingham. No road

(a) Classed among the Private Acts.

or footpath communicating with that part of the said public footpath which was and is situate in the parish of Saxlingham was set out under the said act, and except the footpath mentioned and described in the said order, there was not nor is any way or footpath leading to or communicating with the parish of Saxlingham, between the point where the said footpath so passed the boundary between the parishes of Tasburgh and Saxlingham, and the point where it entered the above-mentioned highway in the parish of Saxlingham; and by the stopping up of the said part of the said footpath in the parish of Tasburgh, pursuant to the said order, the residue of the said footpath, situate in the parish of Saxlingham, has become useless as a public thoroughfare. The trespass committed by the defendant was by walking over the plaintiff's closes in the direction and on the line of the ancient public footpath.

The question for the opinion of the Court is, whether, upon the facts above stated, there was at the time of the trespass by the defendant above mentioned a public right of footway across the north-west end of the plaintiff's closes in the declaration mentioned. If the Court shall be of opinion that there was, at the time of the trespass, such public right of footway across the plaintiff's said closes, judgment is to be entered for the defendant. If the Court shall be of the contrary opinion, then judgment is to be entered for the plaintiff, with 40s. damages.

*Worledge* appeared to argue for the plaintiff, but the Court called on

*Couch*, for the defendant.—The power of the Commissioners is expressly limited by the Inclosure Act to the stopping up of footpaths in the parish of Tasburgh. The word "footpath" in the act does not mean a portion of a

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footpath, but the entire footpath from the highway where it commences to the highway where it terminates. [*Alderson*, B.—Assuming that to be so, ought not the defendant to have appealed to the Quarter Sessions?] The Commissioners acted without jurisdiction. The effect of stopping up the part of the footpath in the parish of Tasburgh is to deprive the public of the use of the other part in the parish of Saxlingham. In dealing with a local or private act of Parliament, the Court will incline against any construction calculated to annihilate or disturb public rights; *Campbell v. Lang* (a). Although a public way may pass through private property, it must have at each end a public terminus; *Young v. Cuthbertson* (b). In *Thackrah v. Seymour* (c), an old footway passed from a public highway over wastes to old inclosures into another public highway. By an award of the Commissioners under a local act for inclosing the wastes, the part of the waste over which the footway ran was allotted, but the footway was not mentioned in the award, nor was any new way set out therein. No power to stop up ways over old inclosures was given by the particular Inclosure Act. It was held that old footway was not extinguished by the allotment. It has never been decided that where there is a footpath from one public highway to another, the right of way is abolished by stopping one end of the footpath; *Rex v. The Marquis of Downshire* (d). Here the Commissioners clearly had no jurisdiction to stop up the part of the footway in the parish of Saxlingham. That parish would have no notice of the order, and therefore could not appeal to the Quarter Sessions.

*Worlledge*, for the plaintiff.—The argument on the other

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| (a) 1 Mac. H. L. Cas. 451. | (b) 1 Mac. H. L. Cas. 455. |
| (c) 1 C. & M. 18.          | (d) 4 A. & E. 698.         |

side amounts to this, that because the Commissioners could not stop up the part of the footpath in the parish of Saxlingham, they could not stop up the part in the parish of Tasburgh. But the act evidently contemplates the case of a footpath going through part of the parish.—He was then stopped by the Court.

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POLLOCK, C. B.—There must be judgment for the plaintiff. The matter is exceedingly plain. The question is whether, where two parishes adjoin, and there is a public footway passing across the boundary and leading from one highway to another, it is competent for the Inclosure Commissioners of one parish, without the assent of the other, to stop up so much of the footway as lies within the former parish. In the first instance, that did appear to me mischievous, and I was desirous of ascertaining whether the act had not made some provision for the mischief. If by the word "footpath" is meant the entire footpath, partly in one parish and partly in another, it is clear that the Commissioners could not shut up the portion in the other parish. But that is not the correct view. I think that the mischief is sufficiently guarded against by the power of appeal to the Quarter Sessions. The Act in question passed so far back as the year 1813, and however reluctant we might be to disturb an arrangement made more than forty years ago, we ought not, in construing an act of parliament, to regard the length of time, but construe it in the same manner whether it has passed forty days or two years. Then what are the expressions used in the Act? It authorizes the Commissioners, "with the concurrence and order of two justices of the peace for the county of Norfolk, acting in and for the division in which the footpaths to be stopped up shall be situate," &c., to stop up, divert, &c., any public road or footpath "*through any part or parts of the lands and grounds in the parish of*

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*Tasburgh*," &c. That clearly contemplates the stopping up of the part of a footpath in that parish, although there is no power to stop it up altogether. The Act then goes on to provide, "that such order so to be made shall be subject to an appeal to the Quarter Sessions, in the like manner and under the same forms and restrictions as if the same had been originally made by such justices." It is objected that the Commissioners had no power to stop up the part of the footway in the parish of Tasburgh, because, by stopping it up, the part of the footway in the parish of Saxlingham became also stopped up. But the answer is, that the act of parliament has so expressed itself, and at the same time has provided a remedy for any wrong, by appeal to the Quarter Sessions. We cannot now inquire whether the footpath was useless or necessary; the Act gave the Commissioners power to deal with that part which is in the parish of Tasburgh, and they have done so, and their order not having been appealed against, is valid. The case of *Thackrah v. Seymour* (a) is distinguishable. There the footway passed over wastes and old inclosures. The Commissioners by their award allotted the part of the waste over which the footway ran, but they had no power to stop up ways over old inclosures. Apparently the Commissioners intended to stop up the footway over both, but this Court was of opinion that as they meant to do an entire thing, and had no jurisdiction as to part, therefore they must be considered as having done nothing at all: that is very different from the present question.

ALDERSON, B.—I am of the same opinion. It seems to me that we ought to construe this Act with reference to the state of the law at the time, as to stopping up highways. The Act (b) enabling justices to stop unnecessary highways

(a) 1 C. &amp; M. 18.

(b) 55 Geo. 3, c. 68, s. 2.

passed two years after this Act. I dare say a difficulty would have existed at the time in proving a public footway over these fields. If the question were whether, when an act of parliament gave the power to stop up part of a public way, the other part is destroyed, I should say not; it may remain as a *cul-de-sac*. So that, in this case, the part of the footway in the parish of Saxlingham may still remain, notwithstanding the other part is stopped up. Then, had the Commissioners power to stop it up? Let us see what are the words of the Act. (His Lordship read them). Here is a public footpath through part of lands in Tasburgh, and the Commissioners are authorized, *with the concurrence of two justices*, to stop up any public footway through any part of the lands of Tasburgh. Is it absurd to suppose that the legislature intended that to be carried into effect literally? The Act of 1815 (*a*) expressly states that two justices shall have power to stop up unnecessary footways. That is to be done by an order stating that the footway is unnecessary. Under the Act in question the justices are to concur in the order of the Commissioners, and if any person is aggrieved by that order he may appeal to the Quarter Sessions. In like manner, when the justices have power to make the order, the Act which gives it them gives a similar right of appeal. So that shortly after the Act in question passed, there was a public Act containing the same provisions, and they may also be found in other local Acts. Then, if there be no absurdity in construing the words of this Act literally, why should we not do so, and say that the part of the footpath which is not stopped up will remain a public footway, and the other part will be no longer a footway but inclosed land, and that if any injustice is done the remedy is by appeal.

BRAMWELL, B.—I am of the same opinion. Mr. Couch says that the jurisdiction of the Commissioners, with the

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concurrence of the justices, extends only to roads in the parish of Tasburgh. With that I agree. He then says that this is not a footway in the parish of Tasburgh, but in that parish and Saxlingham, so that if a person went along it until he came to the boundary of the parish of Tasburgh, he would then have found, not an end of the footway, but a continuation of it into Saxlingham, and therefore it is only a footway in the two parishes. I have some difficulty in agreeing with that view. Mr. Couch also says that the result of the order of the commissioners is, that the part of the footway in the parish of Saxlingham becomes a way which leads to nowhere, and not being a thoroughfare or leading to a market or church, it is either stopped up or remains without any of the characteristics of a public way; and that it is most inconvenient that the parish of Saxlingham should be affected by this order without having the power of appeal. It is obvious that if this footway had been crossed by another public way at the boundary between the two parishes, the inconvenience to Saxlingham might have been equally great, and yet, in that case, it could not be denied that the commissioners would have jurisdiction. Therefore the argument comes to this—we are to say that this footway is indivisible and incapable of being stopped up, because part of it is in one parish and part in another. I think we cannot say that. No great inconvenience will result from our holding otherwise: the entire inconvenience will consist in going along any public highway crossing the footpath, and so turning into it. In every case where a public highway is stopped up the community is more or less affected. Now, with respect to the authorities. In the case of *Thackrah v. Seymour* I have difficulty in seeing whether the way was a public or a private way. If it was a public way the case has no bearing on the question, because the Commissioners could not stop up part of a way unless they stopped up the whole. The case

of *Rex v. The Marquis of Downshire* (*a*), although not an authority for the defendant, has some bearing on the matter. There an inclosure Act empowered the Commissioners to let out highways over the lands to be divided, within the parish, or over any of the old inclosed lands, and to stop up any of the highways in the parish; and it provided that all ways in the parish not so set out or continued, should be stopped up and extinguished and deemed part of the lands to be divided. A road, A., through old inclosures in the parish opened into the waste, and at such opening joined another road, B., which formed a continuation of A., and ran entirely over waste land. No valid order was obtained for stopping road A. Road B. was not set out or continued by the commissioners: it was held that this omission did not extinguish road A. and create a subsequent stoppage to road B., but, on the contrary, that A. remaining open for want of an order of justices, as a consequence B. remained open also. Therefore, if road B. was a separate road unconnected with A., the omission to set out or continue it would not affect road A., but if it was a continuation of that road, the case is open to the same remark which I made with respect to *Thackrah v. Seymour*, viz. that the commissioners had no power to stop up part of a road in the parish. It is sought to apply that to a way going to the extremity of the parish, and there joining a way in another parish; but the Act has not imposed any such qualification. The result is, that although there is a part of this footway which is not in the parish of Tasburgh, still that part which is, has, by the order of the Commissioners, ceased to be a highway; and if any inconvenience is thereby occasioned to the neighbouring parish, they should have appealed.

Judgment for the plaintiff.

(*a*) 4 A. & E. 698.

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April 29.

## MOUNTJOY v. WOOD.

The prerogative of the Crown to remove into the Court of Exchequer a cause in another Court touching the Crown revenue, is not affected by the County Courts Act, 9 & 10 Vict. c. 95.

*W. H. WILLES* moved, on the part of the Crown, to remove into this Court a cause commenced by plaint in the County Court of Gloucestershire, holden at Newnham. The defendant was an officer of the Crown, who had distrained, damage feasant, some sheep of the plaintiff in the royal forest of Dean. The defendant sought to recover 1*l.* damages for illegally distraining and impounding his sheep. The application was founded on the prerogative of the Crown to remove into the Court of Exchequer any cause commenced in any other Court touching the crown revenue.

*Pigott*, Serjt., shewed cause in the first instance.—The jurisdiction of the Court to remove the plaint is taken away by the County Courts Act, 9 & 10 Vict. c. 95, s. 90, which enacts, “That no plaint entered in any Court holden under that act, shall be removed or removable from the said Court into any of her Majesty’s Superior Courts of Record by any writ or process, unless the debt or damage claimed shall exceed 5*l.*”

Per CURIAM (a).—The Crown always had a prerogative right to remove into this Court causes affecting the revenue; and that right is not taken away by the enactment referred to.

Rule absolute.

(a) *Pollock, C. B., Alderson, B., Martin, B.*



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SCOTT v. THE MAYOR, ALDERMEN, AND CITIZENS OF THE  
CITY OF MANCHESTER.

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THE declaration stated that the defendants, by their workmen and servants doing work to and upon certain gas piping in and under a certain street within the city of Manchester, and near to the dwelling of the plaintiff, by their said workmen and servants, so negligently and improperly conducted themselves about the premises, that by means thereof a piece of metal was projected and flew with great force, so as to strike and hit the plaintiff upon his eye, whereby the plaintiff underwent great pain, and lost the sight of his eye, &c.

A municipal corporation employing workmen to lay down gas pipes in the borough is responsible for the negligence of the persons so employed.

Plea.—That the supposed grievances were bona fide done in the course of executing the powers conferred on the defendants by "The Manchester General Improvement Act, 1851," and without any neglect, negligence, misconduct, or mismanagement of the defendants otherwise than by their workmen, servants, or some or one of them, and not from any immediate act or interference of the defendants, and that the workmen and servants employed by them were well skilled and qualified, and proper persons to be employed by them in that behalf.—Demurrer and joinder.

*Atherton*, (with whom was *Spinks*), for the plaintiff.—The council are responsible for the acts of their servants. The 6th section of their Act of Parliament empowers the council to construct gas-works. It cannot be said that the corporation do not derive a profit from the works. The 13th section directs how the residue of the profits of the gas is to be applied. The work was done by the servants of the corporation, and not by a contractor.—The Court then called on

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*Hugh Hill* (with whom was Quain), to support the plea.—The defendants are mere trustees for public purposes; they derive no personal benefit from the works, and are therefore not liable, except for direct misconduct or negligence. In *Hall v. Smith* (*a*) it was held that clerks of commissioners entrusted with the conduct of public works are not liable for the acts of their servants. In that case the action was brought against the clerks to the commissioners, the surveyor, the contractor employed by the commissioners, and the labourer, for digging a hole in a public road and leaving it unfenced. The plaintiff had sustained an injury by falling into the hole. It was admitted that the parties who did the work were liable. Here, as in that case, the defendants were acting in the execution of a public duty, from which they derive no emolument or advantage. They must employ persons to do the work which the Act of Parliament orders them to do. They cannot be expected to be constantly present to watch the workmen. If the doctrine of *respondeat superior* is to be applied to such cases as the present, who will be hardy enough to undertake any of those offices by which so much service is rendered to the country. [Anderson, B.—*Hall v. Smith* goes too far: the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work they will be liable for the acts of such servants.]—He referred also to *Harris v. Baker* (*b*) and *Metcalf v. Hetherington* (*c*).

POLLOCK, C. B.—There must be judgment for the plaintiff. I do not mean to say that the decision in *Hall v. Smith*

(*a*) 2 Bing. 156; S. C. 9 Moore, 226.      (*b*) 4 M. & Sel. 27.  
    (*c*) 11 Exch. 257.

was not a correct one, but more was said than was necessary for the decision of the case. If the defendants are dissatisfied with our judgment they have a remedy by appeal.

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**ALDERSON, B.**—*Hall v. Smith* was rightly decided upon the facts.

**BRAMWELL, B.**, concurred.

Judgment for the plaintiff (*a*).

(*a*) See *Allen v. Hayward*, 7 Q. B. 960, 968, note.

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DENISON *v.* HOLIDAY.

April 30.

**T**HIS was an action of ejectment which was tried at the last summer assizes for the county of York, when a verdict was taken for the claimant, subject to a special case. After considerable difficulty and discussion the case was settled, and it was set down for argument last term too late to be reached till the present term. A few days before the case would have come on for argument in its turn, the claimant died. The Court, on the application of the defendant's counsel, ordered the case to stand over until a suggestion of the death of the claimant had been entered by his legal representative, pursuant to the 194th section of the Common Law Procedure Act, 1852.

After verdict for a sole claimant in ejectment, taken subject to a special case, and before the case came on for argument, the claimant died. The Court ordered the case to stand over until after a suggestion had been entered by the legal representative of the claimant.

**W. H. Watson** now applied to have the case heard in its turn.—No suggestion is necessary. The death of the

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claimant could not be alleged for error. Section 139 of the Common Law Procedure Act, 1852, applies to actions generally (a). If it does not apply to actions of ejectment, at all events the 17 Car. 2, c. 8, s. 1, does; therefore the proceedings here may be continued, and judgment entered up, notwithstanding the death of the claimant. The object of sections 190—194 is to allow the next party interested to continue the proceedings where no result has been arrived at. Here judgment may be entered *nunc pro tunc*. The question which has been litigated between the present parties to the suit will be decided by the judgment of the Court on the special case. New and distinct questions will arise between the defendant and the heir-at-law who may be made a party by the suggestion.

Atherton, contra.—The defendant wishes to know to whom he is to look for the costs of the argument.

Per CURRIAM (b).—The case must keep its place in the paper, but we will not hear the argument till a suggestion is entered.

(a) See *contra*, 2 Archbold's Practice, by Chitty and Prentice, 1473. (b) *Pollock*, C.B., *Alderson*, B., and *Bramwell*, B.



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WISE v. THE GREAT WESTERN RAILWAY COMPANY.

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THE declaration stated that the plaintiff, at the request of the defendants, caused to be delivered to the defendants, and they accepted of him a horse of the plaintiff, to be taken care of and safely and securely carried and conveyed by the defendants from Newbury to Windsor, and there, to wit at Windsor, to be safely and securely delivered by the defendants for the plaintiff, within a reasonable time then next following, for reward to the defendants in that behalf, and although a reasonable time for the carriage and conveyance of the said horse had elapsed, yet the defendants made default, &c., and by and through such default the horse was not delivered, &c.: alleging special damage.

Plea: stating the special terms of the contract.—Replication: that there was no contract signed pursuant to 17 & 18 Vict. c. 31, s. 7.—Rejoinder traversing the replication.

At the trial before Pollock, C. B., at the Middlesex sittings after last Michaelmas Term, it appeared that the horse, which had been hired from the plaintiff, a jobmaster residing at Eton, by one Johnson, was sent by Johnson from the Newbury station, on Saturday, the 31st of March, directed to the plaintiff, at Eton. The directions were written on labels and tied, one to the bridle, the other to the saddle. The horse was sent by the train leaving Newbury at forty minutes past two, and should have been delivered at the plaintiff's stables, at Eton, at five o'clock the same afternoon. It did not arrive, and the plaintiff had no information whatever as to its having been sent until the next morning, when he received the following letter, by post, from Johnson.—“Emborne March 31. Mr. Wise. I wrote a letter, intending to send it with the horse,

A horse was sent by railway directed to the owner at Eton. The sender signed a document in the following terms: Mr. Wise paid for one horse 12s. 6d., Newbury to Windsor. Notice: The directors will not be answerable for damage to any horses conveyed by this railway.

The horse arrived safe at the Windsor station, but the owner not appearing to claim it, it was forgotten and left tied up in a horse box in an exposed situation for twenty-four hours, and was seriously injured by such neglect.

Held, that the Company were not responsible for the injury done to the horse.

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but forgot to take it down to the station. We send you back the horse to-day instead of Monday, as then, in case you require him he will be all ready for hunting on Monday, &c. W. S. Johnson." On reading this letter, the plaintiff made inquiries respecting the horse at the Windsor station, but the parties stated that there was no horse at the station, and that none had been sent there. The plaintiff persisting that the horse was there, it was at length discovered, on a siding, in the horse-box in which it had come from Newbury, and in which it had remained, tied up by the head, for nearly twenty-four hours without food or water, and exposed in an elevated situation to a cold north wind. Johnson had signed the following document:—

"Mr. Wise paid for one horse 12s. 6d.; 9 $\frac{1}{2}$ train Newbury to Windsor. Notice: The *directors* will not be answerable for damage done to any horses conveyed by this railway. I agree to abide by the above notice. W. S. Johnson."

The plaintiff lived three quarters of a mile from the station at Windsor. Sometimes the company sent up horses to his stables, but no regular course of dealing was proved. If a horse was sent, the plaintiff paid the man for bringing it, but in general he sent to the station for his own horses. The learned judge directed the jury to find a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for 20*l.*: the Court to be at liberty to amend the pleadings in any way which might be necessary to raise this question.

Thomas, Serjt., having obtained a rule for that purpose,

Unthank now shewed cause.—The hirer of the horse did not write in time to inform the plaintiff that the horse was sent: in consequence of that, the horse was forgotten and the damage was done. Carriers are responsible at common law for everything except the act of

God or the King's enemies. They sought to protect themselves against so extensive a responsibility by notices. Then came the Carriers' Act, 1 Wm. 4, c. 68, declaring that no public notice should limit or affect the liabilities of carriers at common law, but that carriers should not be liable for the loss of certain enumerated articles unless an insurance was paid. That Act did not affect special contracts, or private notices expressly served. In *Walker v. The York and North Midland Railway Company* (*a*), which related to the carriage of fish, a private notice was served limiting the responsibility of the company: the parties objected, but the company said they would not carry except upon those terms, and they were held to be protected by the notice. *Carr v. The Lancashire and Yorkshire Railway Company* (*b*), and *Austin v. The Manchester Railway Company* (*c*), establish the proposition that carriers, by private notices duly served, might have protected themselves from liability for the loss of any goods under any circumstances, even though caused by the gross negligence of their own servants. That was considered a hardship on the public, and therefore by the 17 & 18 Vict. c. 31, s. 7, it was enacted "that every such company shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration, made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void." The effect of the clause is, that notwithstanding any notice whatever, companies are now liable if there has been actual *misfeazance*

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(*a*) 2 E. & B. 750. (*b*) 7 Exch. 707.

(*c*) 10 C. B. 454.

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on the part of themselves or their servants. They, however, may by private arrangement protect themselves from liability for losses occasioned by any cause other than misfeazance, if the terms are not unreasonable. These terms must be embodied in a special contract, signed by the person delivering the goods to the company. [Bramwell, B. — It can never be contended that people may not enter into any special contracts they please.] In the Great Western Railway Company's Acts, there is a power for any one to run trains and carry goods, paying mileage rates. The company are not compellable to carry goods on the line. If the plaintiff was not content, he should have refused to sign the ticket and paid an insurance. The declaration does not charge misfeazance. The real cause of the injury was the negligence of the sender in not posting in proper time his letter to the plaintiff, to say that the horse was coming.

Thomas, Serjt., and Lush, in support of the rule.—In *Hyde v. The Trent and Mersey Navigation Company* (a), the declaration charged the defendants as common carriers from Lincoln to Manchester. It appeared that the custom had been for the canal proprietors to deliver goods, and a charge had been made for the cartage of a portion of the goods from the wharf, at the time when such portion had been received: it was held to be the duty of the canal company to deliver the goods at the warehouse of the consignees, and that until such delivery the company was subject to the usual liability of carriers. That case has never been overruled. By the 17 & 18 Vict. c. 31, s. 2, every railway company is required to afford all reasonable facilities for delivering traffic from their railway. If there is a duty to deliver goods, a fortiori there must be a duty to deliver live cattle.

(a) 5 T. R. 389.

At all events the company should have sent the horse to the nearest stable. [Bramwell, B.—You would say, if they were not bound to deliver the horse, they were bound to take some care of it. Could they leave casks of sugar exposed to the action of the weather?] They are liable for leaving the horse in the truck the whole night, which was an act of positive negligence. The duty of the company, when a horse arrives and the owner is not at the station, is to put it in a place where it will be reasonably taken care of. [Bramwell, B.—The contract is in writing to carry to Windsor.] The duty to deliver is not inconsistent with it. It is a matter incident to their business as carriers. They should have sent the horse to the nearest livery stable; Bourne v. Gatliffe (a). At the conclusion of the carriage they undertook a new obligation smaller than the other. They would have been safe in delivering the horse at the stables. Garside v. The Trent and Mersey Navigation Company (b), shews that if the livery stables had been burnt, the company would not have been responsible. The company are liable, even if they are to be considered as only gratuitous bailees. [Pollock, C. B.—They were not voluntary bailees]. When the railway company accepted the horse to be carried, they must be taken to have contemplated the possibility of such a contingency as that which happened.

Cur. adv. vult.

POLLOCK, C. B., now said.—This was a case where a horse was sent from Newbury to Windsor. It appeared that the horse had been neglected, and was very much injured in consequence of such neglect. In referring

(a) 4 Bing. N. C. 314. In Proc., 11 Cl. & F. 45.
Error, 3 M. & G. 642. In Dom. (b) 4 T. R. 581.

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to the facts of the case, there can be no doubt whatever, but that the person who had hired the horse was himself the real cause of all the mischief. The railway company may to a certain extent have been blameable, but the person who produced the mischief was the sender of the horse, who sent it without having forwarded any letter to inform the plaintiff that it was coming, and without any groom or person to attend it during the journey. One of the witnesses stated, that it was the usual and proper course for an intimation to be sent, and for somebody to come and meet horses sent by train, at the end of the journey. If that had been done, the horse would have been taken care of, and no mischief would have happened. This action appears to us an attempt to throw upon the railway company, who are certainly not free from blame the responsibility for an injury which in reality was occasioned by the person who sent the horse. But we think the mischief was covered by the terms of the note in writing; and that the horse having been accepted under a special contract, by which the railway company were not to be liable for any damage which might be done to it; that any injury which might happen to it, while remaining at the station till somebody came and made an application for it, must be considered as part of the risk of sending it from one place to the other. We think, therefore, that the verdict ought not to be disturbed, and the rule will be discharged.

Rule discharged.

(a) See *Simons v. The Great Western Railway Company*, App., *Western Railway Company*, 18 C. v. *Dunham*, Resp., 18 C. B. 826. B. 805; *The London and North*



1856.

GREEN v. BRADDYLL.

April 26.

ON the 2nd November, 1852, the plaintiff's attorney, believing that the defendant was residing in France, issued against him a writ of summons in the form prescribed by the 18th section of "The Common Law Procedure Act, 1852," for service on a British subject residing out of the jurisdiction of the superior Courts. In February 1853, the plaintiff's attorney applied to the defendant's attorney to give an undertaking to appear to the action, which was refused. On the 19th March in the same year, the defendant's attorney entered an appearance for the defendant. The plaintiff's attorney not being aware that an appearance was entered, from time to time renewed the writ of summons, and on the 31st March in the present year served the defendant at Leamington with a copy of the renewed writ. The defendant had continually resided in England since September 1851.

Maude now moved for a rule to shew cause why the copy and service of the writ should not be set aside for irregularity. — First, the writ itself is irregular. The 18th section of the "Common Law Procedure Act, 1852," provides that "in case a defendant being a British subject, is residing out of the jurisdiction of the said superior Courts in any place except in Scotland or Ireland, it shall be lawful for the plaintiffs to issue a writ of summons in the form contained in the Schedule (A) to this act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior Courts;

In November, 1852, the plaintiff's attorney issued against the defendant a writ of summons in the form prescribed by the 18th section of the Common Law Procedure Act, 1852, for service on a British subject residing out of the jurisdiction. In the following March the defendant's attorney entered an appearance. The plaintiff's attorney not being aware that an appearance was entered, from time to time renewed the writ, and on the 31st March served the defendant, who had always resided in England, with a copy of the renewed writ.

Held, that there was no ground for setting aside the proceedings.

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and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing," &c. Therefore that form of writ can only be served out of the jurisdiction of the superior Courts, and upon a British subject residing out of such jurisdiction. The 21st section provides that if either of the forms of writ of summons contained in Schedule (A) "shall by mistake or inadvertence be substituted for any other of them, such mistake or inadvertence shall not be an objection to the writ," &c.; but the writ may, upon an ex parte application to a Judge, be amended. Here there was no substitution of one writ for another by mistake or inadvertence, but the writ was purposely and designedly issued in this form, it being supposed that the defendant was resident abroad. [*Alderson*, B.—It was through mistake or inadvertence that the defendant was served with a writ in this form. The plaintiff's attorney was either mistaken in supposing that the defendant was resident abroad, or he did not advert to the circumstance that a writ in this form could only be served on a British subject resident abroad].—Secondly, there was no power to renew the writ after an appearance was entered.

Lush shewed cause in the first instance.—This is clearly a case within the 21st section; and with respect to the other point there is no irregularity. It is the common practice for a defendant to enter an appearance upon notice that a writ has issued against him, and waive the service.

Per CURIAM (a).—There is no ground for our interference.

Rule discharged.

(a) *Pollock*, C. B., *Alderson*, B., and *Bramwell*, B.

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April 30.

CARL LOUIS JUNGBLUTH, HERMANN KIRCHNER and HERMANN MENGE v. WAY.

THE declaration stated, that plaintiffs agreed to sell to defendant, and the defendant agreed to buy of the plaintiffs, certain shares in a mining company, called the Anglo Waldeck Mining Society, for the sum of 1800*l.*, for which sum the defendant agreed to accept four bills of exchange for the payment of 450*l.* each, one of which was to be payable on the 22nd of October, A. D. 1854; and the defendant promised and agreed with the plaintiffs to pay the sums of money for which such bills were to be given at the times when the bills should become due; that in pursuance of this agreement, the defendant accepted, amongst others, a bill drawn by the plaintiff C. L. Jungbluth upon the defendant, for the sum of 450*l.*, payable to the plaintiffs Kirchner and Menge, or their order, on the 22nd of October, A. D. 1854, drawn and made payable in manner aforesaid, at the request and for the convenience of the plaintiffs, without there being any consideration whatever in respect of the plaintiffs Kirchner and Menge being the payees thereof instead of the plaintiffs; and that this bill was afterwards indorsed by the last named plaintiffs to one Charles Frederick Jungbluth, to hold as the agent of the plaintiffs and on their account; that afterwards, while C. F. Jungbluth so held the same, and while the plaintiffs were entitled to the said bill, and to the sum of money therein mentioned, the said bill was wrongfully destroyed by the defendant. Yet, although the plaintiffs have done all things to entitle them to receive from the defendant payment of the sum of money by which the said bill was so

On the sale of certain goods by the plaintiffs, the defendant, the purchaser, agreed to accept bills for the price, and to pay the sums of money for which the bills should be given when the bills became due. One of the bills having been afterwards destroyed by the defendant, in the hands of a person to whom it had been indorsed as trustee for the plaintiffs. Held, that no action could be maintained by the plaintiffs on the promise to pay the money when the bills should become due.

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given as aforesaid; and although the time when the said bill became due elapsed long before the commencement of this suit, and the defendant then had notice of the premises, yet he hath not paid to the plaintiffs the said last mentioned sum of money, or any part thereof; nor hath he paid the said bill of exchange, but has always refused to do so.

Demurrer and joinder therein.

Honyman, in support of the demurter.—At time of its destruction, this bill was legally vested in Charles Frederick Jungbluth. In *Crowe v. Clay* (a), an action brought on the consideration of a bill, and a plea that the bill which had been given for it was lost, was held to be a sufficient answer. That was before the Common Law Procedure Act, 1854: since the passing of that act, the defendant would have no defence to an action by Charles Frederick Jungbluth.

Raymond, contra.—The undertaking is not only to give but *pay* the bills. Can it be said that this agreement amounts to no more than is implied from the acceptance of the bill? [Alderson, B.—I think that it is nothing more.] It is not an uncommon thing for a person to agree that he will do something which he is already bound to do by contract. A *prima facie* breach is admitted on the record. [Martin, B.—In the ordinary case, where goods are sold and a bill given for the price, which is indorsed over; if the bill is not paid, no action lies by the seller of the goods while the bill remains in the hands of the indorser.] Here is something more than the case of goods sold, and a bill given in payment; there is an express contract with the plaintiffs to pay when the bill becomes due. Unless no such contract as that stated can be made, the plaintiff is

entitled to judgment, if it be only for nominal damages.

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MARTIN, B.—The agreement must be read as a promise to pay the person entitled to receive payment of the bill at maturity.

Per CURIAM.—The plaintiff may have leave to amend, otherwise there must be judgment for defendant.

Rule accordingly.

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CLAY v. YATES.

May 3.

DECLARATION for goods sold and delivered, and work and labour and materials.—Plea: never indebted.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, it appeared that the defendant applied to the plaintiff, a printer, to print a second edition of a treatise called "Military Tactics." This edition was to contain a dedication to Sir William Napier. The plaintiff verbally agreed to find the paper and print 500 copies for 4*l.* 10*s.* a sheet. At the time the plaintiff commenced printing the treatise the dedication was not written, but it was afterwards sent to him and the type set up without his having any knowledge of its contents. After the proof sheets of the dedication had been revised by the defendant and returned to the plaintiff, he for the first time discovered that the dedication contained libellous matter, and he refused to complete the printing of it. The defendant would

The plaintiff, a printer, verbally agreed to print for the defendant 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, and after the proof sheet of the dedication was revised by the defendant and returned to the plaintiff; he, for the first time, discovered that it contained libellous matter, and refused to complete the printing of it.

17th section of

Held: First, that this was not a contract for the sale of goods within the Statute of Frauds as extended by the 9 Geo. 4, c. 14, s. 7.

Secondly, that as the dedication was libellous the plaintiff was justified in refusing to complete the printing of it, and was entitled to recover for printing the treatise.

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not pay for the treatise without the dedication, whereupon the present action was brought to recover for printing the treatise.

It was objected, on behalf of the defendant: first, that this was a contract for the sale of goods within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, as extended by the 9 Geo. 4, c. 14, s. 7; secondly, that the contract was an entire one, viz., to print the treatise and the dedication, and that the plaintiff having refused to print the dedication was not entitled to recover in respect of the treatise. The learned judge left it to the jury to say, first, whether work and labour was the essence of the contract, and the materials merely ancillary; secondly, whether the dedication was libellous. The jury found both questions in the affirmative, whereupon a verdict was entered for the plaintiff, leave being reserved to the defendant to enter a verdict for him.

*Quain*, in the present term, obtained a rule nisi accordingly, against which

*Montague Smith* and *Hannen* now shewed cause.—This is not a contract for the sale of goods, but for work, labour and materials. The printer bestows his skill and labour in printing the work, and the materials are merely ancillary. In *Grafton v. Armitage* (a), the plaintiff was employed by the defendant to devise a method of curving metal tubing for the purpose of manufacturing life-buoys, and it was held that the plaintiff might recover under a count for work, labour, and materials. In *Clarke v. Mumford* (b), which was an action on a farrier's bill, Lord *Ellenborough* said, “Any species of work and labour may be given in evidence under such a general count; and the medicines here may

(a) 2 C. B. 336

(b) 3 Camp. 37.

be considered *materials* employed by the plaintiff in and about the business of the defendant." It is true that in *Atkinson v. Bell*(a), *Bayley*, J., expressed an opinion, that where a person is employed to work up his own materials into a chattel, he cannot recover for work and labour; but in *Grafton v. Armitage*(b), *Maule*, J. says, "In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon materials that are the property of the plaintiff;" and *Erle*, J. adds, "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink, might he not maintain an action for work and labour in preparing it." [*Alderson*, B.—If the defendant had found the paper and ink, it would have been a contract for work and labour simpliciter; and the fact of the plaintiff having found the paper and ink only makes it a contract for work, labour, and materials.]—Secondly, the plaintiff is entitled to recover for printing the treatise, notwithstanding he refused to deliver the dedication. When the plaintiff discovered that the dedication was libellous, he was justified in refusing to complete the printing of it. In *Poplett v. Stockdale*(c), *Best*, C. J. ruled that the printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him.

*Quain*, in support of the rule.—This is a contract for the sale of goods within the 17th section of the Statute of Frauds. Suppose a printer is employed to print a hundred visiting cards, would that be a contract for work and labour? [*Martin*, B., referred to *Bensley v. Bignold*(d), where it was held that a printer could not recover for labour or mate-

(a) 8 B. & C. 277.

(c) Ry. & Moo. 337.

(b) 2 C. B. 336.

(d) 5 B. & Ald. 335.

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rials used in printing a work to which his name was not affixed, pursuant to the 39 Geo. 3, c. 79, s. 27.] In Addison on Contracts, p. 223, 4th ed., it is said, "There is a great analogy, it has been observed by civilians, between this class and description of contract of sale and the contract of letting and hiring of work and labour; and we are told, in the Digest and in the Institutes, how to discriminate between the one and the other. If, it is said, the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is a contract of sale. If, on the other hand, the employer has furnished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour." Again, the same author says, p. 443, "If the ground work of the labour or the principal material entering into its composition has been provided by the employer, the contract is a contract for the letting and hiring of work, although the undertaker of the work may have furnished the accessorial materials necessary for its completion. If a man, for instance, sends his own cloth to a tailor to be made into a coat, and the tailor furnishes the buttons, the thread, and the trimmings, the contract is, nevertheless, a letting and hiring of work, and not a contract of buying and selling." In support of that position the author cites Pothier, Louage d'ouvrage, No. 394. [Martin, B.—Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it, which is worth 10s., surely he might recover under a count for work and labour.] No certain rule can be deduced from the comparative value of the labour and materials. In *Atkinson v. Bell* (a), Bayley, B., says, "If you employ a man to build a house on your land, or to make a chattel, with your materials, the party who does the work has no power to appropriate the produce of his labour and your

(a) 8 B. & C. 277.

materials to any other person. Having bestowed his labour, at your request, on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered." *Grafton v. Armitage*(a) is distinguishable, for there the contract was not to deliver anything in a manufactured state, but merely to make experiments. [Martin, B.—The work, when printed, may not be worth, as a book, one halfpenny, or it may be worth 100*l.*; then, if there has been no express stipulation as to payment, in what way is the printer to be paid?]—Secondly, this was an entire contract, to print both the dedication and the treatise, and the plaintiff is not entitled to charge for printing the treatise without the dedication. In such a case no implied contract arises.

POLLOCK, C. B.—The rule must be discharged. The first question is, whether this is a contract for the sale of goods within the 17th section of the Statute of Frauds, and I am of opinion that it is properly a contract for work, labour and materials. It appears from Chitty on Pleading(b), that a count for work, labour and materials may be resorted to by farriers, medical men and surveyors, and that such is the form in which they are in the habit of suing. Against the opinion of Bayley, J., in *Atkinson v. Bell*, we may set off the opinions of Maule, J., and Erle, J., in the case of *Grafton v. Armitage*, and then we have to decide the point

(a) 2 C. B. 336.

(b) Vol. 1, p. 359; Vol. 2, p. 61, 62, 7th ed.

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as if it were quite new and without authority. It may happen that part of the materials is found by the person for whom the work is done, and part by the person who does the work, for instance, the paper for printing may be found by the one party, while the ink is found by the printer. In such cases it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. My impression is, that in the case of a work of art, whether in gold, silver, marble or plaster, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour and materials. No doubt it is a chattel that was bargained for, and, if delivered, might be recovered as goods sold and delivered, still it may also be recovered as work, labour and materials. Therefore it appears to me that this is properly a contract for work, labour and materials. I am inclined to think that it is only where the bargain is for *goods* thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act, 9 Geo. 4, c. 14, applies, and the reason why no cases on this subject are found in the books is, that before Lord Tenterden's Act passed the Statute of Frauds did not apply to the case of goods not actually made, or fit for delivery. I think, therefore, that the objection does not arise.

Then with respect to the other point, I entertain no doubt. I told the jury that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it until after it was printed; he then

discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is *bond fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful. For these reasons I think that the rule ought to be discharged.

ALDERSON, B.—I am of the same opinion, and have nothing to add.

MARTIN, B.—I am of the same opinion. There are three matters of charge well known to the law, viz., for labour simply, for labour and materials, and for goods sold and delivered. Now every case must be judged of by itself, and what is the present case? The defendant having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type, shall set it up in a frame and impress it on paper, that the paper shall be submitted to the author, that the author having corrected it, shall send it back to the printer, who shall again exercise labour and make it into a complete thing in the shape of a book. That being so, I think that the plaintiff was employed to do work and labour, and supply materials, and for that he is entitled to be paid. It seems to me, that the true criterion is this—suppose there was no contract as to payment, and the printer brought an action to recover what he was by law entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the

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paper on which it was printed, but he would be entitled to recover for his work, labour, and materials supplied; therefore, this is in strictness, work, labour, and materials done and provided by the plaintiff for the defendant. In the case of *Bensley v. Bignold* (*a*), where the defence was, that the printer had not affixed his name to the book as required by the 39 Geo. 3, c. 79, s. 27, it was treated by *Abbott*, C. J., *Bayley*, J., and *Holroyd*, J., as a contract for work, labour, and materials, and concurring in opinion with them, I do not think it profitable to go into an examination of the other cases.

With respect to the other point, I agree that as soon as a printer discovers the objectionable nature of the work which he is employed to print, he ought to stop, and that he would not be entitled to recover for work done, after he made the discovery. But I cannot doubt that in this case, although the contract has never been performed, yet as the work was commenced on the retainer of the defendant, and in ignorance that part of it was unlawful, a duty arises to pay the plaintiff for that part which he has performed. It is like one of those transactions where a person accepts goods not made according to contract, in which case the law implies a promise to pay for them; though perhaps the better expression would be, "a duty arises to pay for them," for the true ground of the right to recover is, that such a state of circumstances has arisen that in point of law there is a duty to pay.

**BRAMWELL, B.**—I did not hear the whole of the argument, and will not therefore give a decided opinion, but I am inclined to think that the plaintiff is entitled to recover, even assuming Mr. Quain's argument to be right. The

(*a*) 5 B. & Ald. 335.

contract is to print a treatise and a dedication, the latter to be thereafter furnished. That imposed on the defendant the obligation of furnishing a dedication, such as the plaintiff could by law print. It may be true, as Mr. Quain says, that the entire article was not produced, and the defendant was not bound to accept a partial one; but then the plaintiff might maintain an action against the defendant on his implied contract to furnish a lawful dedication, or instead of that, he may rely upon an implied contract to be paid for what he could lawfully print. However, for the reason before stated, I give no decisive judgment on the point.

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Rule discharged.

DORSON v. COLLIS, and Another.

May 4.

THE declaration stated, that it was agreed between the plaintiff and the defendants, that the plaintiff should serve the defendants, and be retained by them in the capacity of a traveller until the 1st of September, A. D. 1855, and for a year thereafter, unless the said employment were determined by three months notice given by the plaintiff or defendants respectively, for hire and reward agreed upon between them. And the plaintiff entered into the said service; and has done all things on his part to entitle him to the fulfilment by the defendants of the said agreement, and was always ready and willing to continue in the said service: Yet the defendants, before the said 1st of September, A. D. 1855, and during the said period of service, discharged and dismissed the plaintiff against his will from the said service, whereby the plaintiff has been prevented from earning his salary, &c.

A contract for service for more than a year, but subject to determination within the year on a given event, is within the 4th section of the Statute of Frauds, and must therefore be in writing.

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Plea.—That it was not agreed as alleged. Issue thereon.

At the trial, before *Pollock*, C. B., at the London sittings after last Michaelmas term, it appeared that on the 2nd of October, 1854, the defendants verbally agreed to employ the plaintiff as a traveller upon the terms stated in the declaration. It was objected on the part of the defendants, that this was an agreement not to be performed within the year, and therefore required to be in writing by the fourth section of the Statute of Frauds, 29 Car. 2, c. 3. The learned Judge was of that opinion, and directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him.

*Hannen*, in last Hilary term, obtained a rule nisi accordingly, against which

*Montague Smith* now shewed cause.—This was a contract for service for more than a year. The circumstance that the agreement *might* be determined within the year, does not take the case out of the operation of the Statute of Frauds; *Roberts v. Tucker* (*a*).—The Court then called on

*Hannen* to support the rule.—In *Roberts v. Tucker*, it did not appear on the face of the contract, that it could be performed within a year, in this case it does. There is no authority for saying that, where a contract may by its terms be put an end to within the year, it is within the statute. A hiring for a year, and so on from year to year as long as the parties shall respectively please, is not a contract within the statute, *Beeston v. Collyer* (*b*). Where the contract provides for its determination within the year, if notice be given that it shall not extend beyond the year,

(*a*) 3 Exch. 632.

(*b*) 4 Bing. 309.

no part of the contract will have been unperformed. [*Pollock*, C. B.—A contract, which by its general terms is not to be performed within the year, is not taken out of the statute because it may be defeated on a given event. Suppose a contract for two years provided, that if a certain person returns from abroad before the expiration of the first year, it should be at an end: *Birch v. The Earl of Liverpool* (*a*), is an authority that such a contract is within the statute.] In that case the contract was for five years; and it contained no provision for its determination within the year. [*Pollock*, C. B.—By the custom of trade it was determinable at any time within that period; and *Bayley*, J. said, “Assuming that the custom proved is to be considered as part of the contract, still the contract was in its terms an agreement for five years, determinable by the parties within that period.”] Suppose this had been a contract for a year, with a proviso for continuing it by notice for another year, that would not have been within the statute: yet this case is not distinguishable in principle. *Metzner v. Bolton* (*b*) shews, that the defeasance is part of the contract. [*Alderson*, B.—The distinction is this, where the contract is for more than a year, though subject to a defeasance, it is a contract not to be performed within the year, just as a tenancy for a year, with power to determine it within the year, is a tenancy for a year; but where the contract is for a year, subject to a proviso for enlargement, that is only a contract for one year. The reasoning would equally apply to a contract to be determined by the death of either party.] In *Fenton v. Emblers* (*c*), *Denison*, J., said, “The Statute of Frauds plainly means, an agreement not to be performed within the space of a year, and expressly and specifically so agreed: it does not extend

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(*a*) 9 B. & C. 392. (*b*) 9 Exch. 518.(*c*) 3 Burr. 1281.

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to cases where the thing may be performed within the year." That doctrine has been long confirmed, 1 Smith Lead. Cas. 242, 4th ed. In *Bracegirdle v. Heald* (a), and *Snelling v. Lord Huntingfield* (b), the hiring was to commence from a future day.—He also referred to *Sweet v. Lee* (c).

POLLOCK, C. B.—The rule must be discharged. It is contended, that a contract for more than a year, but which may be defeated on a given event within the year, is not required to be in writing by the fourth section of the Statute of Frauds. Now the object of that enactment was to prevent contracts, not to be performed within the year, from being vouched by parol evidence, when, at a future period, any question might arise as to their terms. To guard against that, the legislature has said that such contracts shall be in writing. No doubt formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law as strictly as possible, but in my opinion that is not a proper course of proceeding. We ought faithfully to interpret acts of parliament as we think the legislature meant. *Bracegirdle v. Heald* (a), is an authority that this contract, apart from the defeasance, would clearly be within the statute. Then does the defeasance take it out? I think that a contract is not the less a contract not to be performed within the year, because it may be put an end to within that period. A lease for five years, subject to a defeasance on the happening of a certain event, does not cease to be a lease for five years because it may be defeated at the end of the first year. It seems to me that the case of *Birch v. The Earl of Liverpool* (d), is precisely in point.

(a) 1 B. & Ald. 722.  
(c) 3 M. & G. 452.

(b) 1 C. M. & R. 20.  
(d) 9 B. & C. 392.

**ALDERSHON, B.**—I am of the same opinion. The very circumstance that the contract exceeds the year, brings it within the statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, which might come into operation before the end of the first year. The reason for the enactment was, that there might be no dispute beyond the year, as to the terms of the contract. *Beeston v. Collyer* (*a*) was the case of a yearly hiring: there was a contract to be performed within the year, and that might lead to another, which the parties might or might not make for a year; if they did enter into it after the first or any subsequent year, it was a fresh contract: but when once the contract exceeds the year, the circumstance that it is defeasible will not make it other than a contract for more than a year. See the absurdity of holding otherwise: at the end of two years and a half, one of the parties might claim a right to put an end to a parol contract for five years by giving three months' notice; but the very subject of dispute might be, whether or no he had a right to give such notice. That shews that this is a contract within the statute.

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Rule discharged.

(*a*) 4 Bing. 309.

ARDING and Another *v.* HOLMER.

May 5.

IN this case a writ of error coram vobis had issued to reverse an outlawry, on the ground that the defendant was beyond the seas at the time of exigent awarded.

Matthews had obtained a rule calling on the defendant to shew cause why the writ of error, and all subsequent

The provisions in the Common Law Procedure Act, 1852, relating to the abolition of writs of error do not apply to judgments of outlawry in civil suits.

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proceedings, should not be set aside for irregularity. The ground relied on was that ss. 148—158 of the Common Law Procedure Act, 1852, applied to writs of error to reverse outlawry in civil suits. He stated that in *Solomon v. Graham* (a) the new forms of proceedings in error had been adopted.

Lush now shewed cause.—The enactments relating to writs of error have reference only to proceedings and judgments in the cause. That appears not only from the wording of section 148, but also from the forms 10, 11, 12, in Schedule A. Outlawry has no relation to the cause itself, but is a collateral proceeding. It is a quasi criminal proceeding. The judgment is a punishment for a contempt. The Crown is interested, and a writ of error cannot be brought without the fiat of the Attorney General. [*Pollock*, C. B.—The Master informs us that in this Court, for the last twenty years, the fiat of the Attorney General has never in fact been required or given.]—The Court then called on

Matthews to support the rule.—The outlawry is not a collateral record. In *Mac Michael v. Johnson* (b) it was held that an allegation, that a co-defendant was by due course of law outlawed at the suit of the plaintiff in that plea and suit, was sufficient without a “prout patet per recordum.” Lord *Ellenborough* said this was no averment of any collateral record; the judgment appeared in the very suit. The Queen is not a party to the proceeding to reverse the judgment, and the writ is in the usual form of a writ of error coram vobis (c). [*Alderson*, B.—

(a) 5 E. & B. 809. But see S. C. Q. B., May 6, 1856.

(b) 7 East, 50.

(c) Tidd's Forms, 520.

That is, because the Queen's name does not appear in the original suit. *Bramwell*, B.—The writ of *levari facias* commands the sheriff to pay the monies levied into the Exchequer, for the use of the Queen. At the instant of outlawry there is a new proceeding, a judgment of forfeiture]. The plaintiff issues execution on that judgment; and the sheriff is, by the writ, commanded to hold an inquisition, and pay the proceeds into Court. [*Pollock*, C. B.—They would not be paid out without a petition. In many cases that may be a matter of form, but if the outlaw were indebted to the Crown, the plaintiff would not get his money. *Bramwell*, B.—The Crown has an interest: it may be a real one. In most cases it is only matter of form, but form is the foundation of practice and pleading.] All the proceedings in outlawry are strictly between party and party, at any rate up to the time when judgment of outlawry is pronounced (*a*)); and if so, the writ of error to reverse that judgment is a writ of error "in a cause," within section 148 of the Common Law Procedure Act. The Queen does not become a party to the proceedings until the plaintiff takes steps to seize the outlaw's goods, or the profits of his lands, all of which are forfeited and can be got at only by the assistance of the Crown (*b*). Even the judgment of reversal of an outlawry in the Court in which it was obtained does not allude to the Queen's rights, which are waived by a supersedeas to the sheriff. Proceedings to outlawry were formerly the only means of getting judgment where the defendant was abroad. That outlawry is a judgment in the original suit, besides involving the collateral consequence of forfeiture, appears

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(*a*) See *Tidd's Forms*, 49, &c. lawry, (R. 6.) *Yearbook*, 38 H. 6,

(*b*) *Tidd's Forms*, 59, 60. See 1; 21 H. 6, 21; 22 H. 6, 7; 22 however as to the right of the H. 6, 23 *a*.
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from 2 Hawk. P. C., c. 48, s. 23, where it is said, that "after judgment of outlawry execution shall be awarded; but no sentence shall be pronounced because the outlawry is a judgment, and no man shall have two judgments for the same offence." And to the same effect is 3rd Inst. 52. 212. [Alderson, B.—It is a judgment in a criminal case, because the Crown is a party to the original proceeding.] The invariable practice of the Exchequer is to treat the judgment as a judgment obtained for the plaintiff, and to pay over to him the proceeds levied under the special *capias utlagatum* (*a*). The Crown is bound by the Act.—He referred to *Rex v. Wright* (*b*); *Lloyd v. Skatt* (*c*); *The Baron de Bode v. The Queen* (*d*).

POLLOCK, C. B.—I am of opinion that the rule must be discharged. The question is, whether the 148th section of the Common Law Procedure Act, 1852, applies to outlawry in civil suits. The marginal note to that section is not correct. The word "abolished" does not occur in the enactment. Its words are, "a writ of error shall not be necessary or used in any cause." The proceeding in error is no longer to be an entirely new proceeding, but a step in the cause, to be taken in manner thereafter mentioned. The clauses following section 167 point out the mode of proceeding. A form is given which cannot apply to outlawry. Section 151 contains a provision for bail in error, by a recognizance in double the sum adjudged to be recovered by the judgment, which is wholly inapplicable, because in outlawry there is no judgment to recover any sum of money whatever. By section 160 either party may confess error. That cannot apply to cases where the Crown is interested. It is said

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| <i>(a)</i> See Comroy. Introduction to Custodian Reports, pp. 25, 31.<br><i>(b)</i> 1 A. & E. 434. | <i>(c)</i> 1 Doug. 350.<br><i>(d)</i> 13 Q. B. 364. |
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that the supposed interest of the Crown is only form; but the Crown may be interested in fact. It appears to me, therefore, that the legislature never contemplated interfering with proceedings in outlawry. The forms given by the Act are applicable to other proceedings in error, not those to reverse an outlawry. I think therefore that a writ of error is rendered unnecessary only in causes purely between party and party. In cases of outlawry, after judgment the Crown is interested, as has been pointed out by my brother *Bramwell*. There is this difference between outlawry in civil and criminal proceedings: in criminal proceedings a man is outlawed altogether, in civil suits merely in the particular suit; but in both cases the outlaw is considered guilty of an offence almost amounting to rebellion, and his property is directed to be seized for the Crown, because he has forfeited it.

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**ALDERSON, B.**—I am of the same opinion. Outlawry is a proceeding entirely collateral to the suit. If one defendant is outlawed, the proceedings go on against the rest, and there may be judgment in the cause against those not outlawed. Suppose that afterwards the party outlawed sets aside the outlawry, that is not a step in the cause; it does not make the cause progress. I think that the words of the act do not apply to cases where the Crown has an interest, nor to such proceedings as outlawry, but only where the writ of error is a step in the cause.

**BRAMWELL, B.**—The Common Law Commissioners were only authorized to consider the process and pleading of the Courts; that is to say, the forms of proceedings in cases between party and party. They would have scrupled to meddle with any right of the Crown. Section 151 provides, that no execution shall be stayed unless the person in whose name the proceedings in error are brought

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shall be bound in double the sum adjudged to be recovered by the judgment. This cannot apply to judgment of outlawry. Many other provisions are manifestly inapplicable to it. It is difficult to say what might be the consequence if we held the Act to apply to outlawry. As soon as judgment of outlawry has been given, another interest arises, viz.—that of the Crown, and no provision is made in the Act with reference to that interest. I am therefore of opinion that this rule must be discharged.

Rule discharged with costs (a).

(a) See *Regina v. Seale*, 5 E. & B. 1; *Solomon v. Graham*, Q. B., May 6, 1856.

May 5.

#### LEE v. VESSEY, MASTIN and Others.

A joint warrant to two persons to distrain for drainage rates, under an Act for draining certain fens and improving the navigation of a river, may be well executed by one of them.

**T**HIS was an action of trespass brought by the plaintiff against the defendants, being five of the commissioners under the Witham Drainage Acts and their bailiff, for illegal distraining for certain drainage rates.

At the trial, before Lord *Campbell*, C. J., at Lincoln Spring Assizes, it appeared that the plaintiff was tenant of a farm in Wildmere Fen. The statute authorizing the distress, (2 Geo. 3, for draining the fens and restoring the navigation of the river Witham), provided, that if any person should neglect, for twenty-one days after demand, to pay the drainage rates the commissioners might authorize the collector to levy. The warrant to distrain was a joint, not a joint and several warrant. It was directed to Lewis the collector, and Mastin the bailiff. Mastin, who was not a collector, made the distress alone, the collector not being present. The learned Judge told the jury that Mastin had a right to distrain, and the jury, under such direction, found a verdict for the defendants.

*Field*, on a former day in this term, had obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the Judge held the distress valid, though the warrant to distrain was a warrant to two jointly, and was executed by one only (a). He cited *Boyd v. Durand* (b).

*Hayes* (with whom was *Flood*), now shewed cause.—Any defect in the form of the authority to the bailiff is cured by the statute regulating the distress. The 2 Geo. 3, the “Witham Drainage Act, 1762,” provides “that a distress shall not be deemed unlawful, nor the parties making the same be deemed trespassers, on account of any defect or want of form in the warrant of distress or other proceedings relating thereto.” This is like the case of a tenant objecting to the form of a warrant to a broker to distrain. The money was due; the land was charged with it, and there was a right to distrain. [*Bramwell*, B.—If Mr. *Field* is right, how are the five commissioners liable?] The warrant, though addressed to two persons, might be well executed by one. There is a distinction in this respect between offices of a private nature and those of a public nature. In *Lashbrooke's case* (c) a warrant was directed by the sheriff of Somersetshire to four bailiffs, and two arrested. It was objected that the warrant was made to all, and not *conjunctionem et divisionem*, and therefore it shall be executed by all, and not by two. But the Court said that when the sheriff makes such a warrant it may be ex-

(a) This point was not stated in the rule as drawn up and served. The ground there stated was that the warrant was directed to Lewis and Mastin jointly, and that Mastin, who made the distress, was not a collector within

(b) 2 *Taunt.* 161.

the meaning of the Act. The Court referring to their notes of what took place on moving for the rule, allowed the case to be argued as if the rule had been drawn up rightly.

(c) *Hutton*, 127.

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ecuted by any of the persons named. *Boyd v. Durand* (*a*) was the case of a warrant made to four, commanding them and every of them jointly, *and not severally*, to arrest. The arrest having been made by one, the Court refused to discharge the defendant. In *Lambard's Eirenarcha*, c. 2, p. 89, there cited, it is said, "if a precept be addressed to two, yet one alone may serve it." In *Burn's Justice*, title "Warrant" IV., it is said, "a warrant directed to several may be executed by any of them, but if directed to two or more *jointly only*, it means all must execute it." The dictum in *Boyd v. Durand* seems to be the only authority for that.—(On this point he also referred to *Co. Litt.* 181 *b*; *East P. C.* 320; *Hale P. C.* 458.) This distress being for a drainage rate, relates to a matter of public interest. *Rex v. Whitaker and Others* (*b*).

Field, in support of the rule.—A power to two must be executed by both. This is an authority for a private cause. [*Pollock*, C. B.—The rule does not apply only to authorities relating to public justice; it is enough if the authority be one to be exercised *pro bono publico*.]

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. *Lashbrooke's case*, and the other authorities cited, shew that a warrant to two, in a case like the present, may be well executed by one. Apart from that, I am disposed to give my judgment on the other point made by my brother *Hayes*. The rate was payable; it had been duly demanded, and there was an unquestionable right to distrain. This is the very case to which was meant to apply the provision in the Act "that the distress shall not be deemed unlawful, nor the parties making the same be deemed trespassers, on account of any defect or want of form in the warrant of distress, or the proceedings relating

(*a*) *Taunt.* 161.

(*b*) 9 *B. & C.* 648.

thereto." If an informal authority was given to the defendant, who made the distress by the others, who are commissioners, commanding him to distrain alone, the clause would expressly cure that.

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ALDERSON, B., concurred.

BRAMWELL, B.—I am of the same opinion. It is impossible to distinguish *Lashbrooke's case* from this. This distress arises out of an act for draining the fens and restoring the navigation of the river Witham. It is a matter of far more importance, pro bono publico, than levying money from J. S. for some one else.

Rule discharged (*a*).

(*a*) See Dalton's Sheriff, p. 156, citing 27 Ass. p. 67; *Walsh v. Southworth*, 6 Exch. 150.

IN RE FREESTONE.

May 7.

A WRIT of habeas corpus had issued to bring up the prisoner, who had been convicted under the 5 Geo. 4, c. 83, s. 4. The conviction stated that the prisoner, on the 21st day of April, A. D. 1856, did unlawfully play in a certain open and public place, to wit, in a third-class carriage used on the London, Brighton, and South Coast Railway, with an instrument of gaming, to wit, three cards, at a pretended game of chance, called "odd man."

A prisoner was convicted of playing in a certain open and public place, to wit, a carriage used on a railway, with an instrument of gaming.

Held, that the conviction was bad, it not appearing that the carriage was being used for the conveyance of passengers on the line.

Metcalfe now moved that the prisoner should be discharged out of custody.—The words of the statute are;

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"every person playing or betting in any street, road, highway, or other open or public place, at or with any table or instrument of gaming." First: a railway carriage is not an open and public place. To constitute the offence the place must be public, as a street is public, that is, open to all the world. [Pollock, C. R.—The line is a public highway (*a*).] Secondly: cards are not a "table or instrument of gaming." The statute meant to apply to thimblerig or roulette tables, or the like.

No one appeared in support of the conviction.

POLLOCK, C. B.—We are all of opinion that this conviction cannot be supported, and that the prisoner is entitled to his discharge. Without saying whether cards are an instrument of gaming within the meaning of this act of parliament, we think the place is not so described in the conviction as to come within the Act. The gaming may have taken place between two porters in a carriage shunted off the main line into one of the company's warehouses.

ALDENDERSON, B.—I am of the same opinion. I do not say that the conviction would not have been good, if it had alleged that the carriage was then and there running and being used for the conveyance of passengers on the line of railway. Here nothing of the kind is stated.

MARTIN, B.—I express no opinion as to whether gaming in a railway carriage, when being used for the conveyance of passengers on the line, is within the act of parliament; but this conviction is insufficient.

(*a*) See *Regina v. Holmes*, 1 & Kir. 360.
 Dears. C. C. R. 207; S. C. 3 Car.

BRAMWELL, B.—The conviction should have contained an allegation that the carriage was then and there used for the carriage of travellers on the line. If so, probably this conviction might have been supported.

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Prisoner discharged.

—
GRiffin v. Hoskyns, Esq.

May 7.

FIELD had obtained a rule calling on the plaintiff to shew cause why the Master should not review his taxation of the plaintiff's costs. The action was brought by the plaintiff against the defendant, as sheriff of Warwickshire, for trespasses committed by the defendant and his officers, in arresting the plaintiff under a writ of *ca. sa.* The plaintiff obtained a verdict with twenty-five pounds damages. The plaintiff was a material witness on his own behalf. A writ of *habeas corpus ad testificandum* had been sued out, by which the plaintiff, who was confined in Warwick gaol, a prisoner for debt, was brought up to attend the trial as a witness. He was present at the trial, but was not called upon to give evidence. There was another action tried on the same day, brought by him against the same defendants for trespasses in the execution of a *fi. fa.*, in which a verdict was found for the defendants. In that action the plaintiff was called, and gave evidence. In taxing the plaintiff's costs in this cause the Master had allowed to the plaintiff all the costs of the writ of *habeas corpus*, by which the plaintiff was enabled to attend both trials.

A plaintiff having been brought up by *habeas corpus* to give evidence in one cause, when at the assizes gave evidence in another cause against the same defendant. Having succeeded in the first and failed in the second cause.

Held, that on taxation of the costs of the first cause, he was entitled only to one moiety of the costs of the *habeas corpus*.

O'Brien shewed cause.—The plaintiff was not examined; but it is sworn that he was a material and necessary

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witness, without whom it would not have been safe to go to trial. The accidental circumstance that he was called as a witness in the other cause cannot affect his right to the costs of the habeas corpus, as against the defendant in the cause in which it was issued.

*Field* appeared in support of the rule, but was not called upon.

POLLOCK, C. B.—A party who fails in a cause must bear the expense of his failure. The rule is, if a witness attends in one cause only, he will be entitled to the full allowance. If he attend in more than one cause he will be entitled to a proportionate part in each cause only. If the expense of bringing up this party as a witness was 10*l.*, a proportion—one-half must be allowed.

Rule absolute.



May 7.

## TAYLOR v. ROBERTS.

An insolvent seeking to except his wearing apparel, furniture &c., under the value of 20*l.* from the operation of the 7 & 8 Vict. c. 96, must in his schedule specify each article and its value. It is not enough to state generally the character of the goods, and a gross sum as their value.

THIS was an action of trover tried before *Martin*, B. at the Middlesex sittings in the present term, when a verdict was found for the defendant on the plea of "not possessed." It appeared that the plaintiff being about to file a petition for protection from process, under the 7 & 8 Vict. c. 96, had deposited some of his goods with the defendant. In the plaintiff's schedule, in the first page under the heading "excepted articles," certain articles of dress, stated to be of the value of 5*l.*, were set down. In another page, opposite the name of the defendant, who was entered as a claimant for the sum of 16*l.*, was this entry: "On the 23rd day of October, 1854, I deposited with her (Ann Roberts) sundry articles of furniture, worth in my estimation about 15*l.*, for safe keeping to avoid the same being seized under an

execution issued against my effects. She now claims of me the amount inserted, and a lien for that sum on my said furniture, but I dispute altogether her right to do so. This property, however, would, if obtained possession of, fall into my excepted articles, and not benefit my estate."

The officer of the Court went with the plaintiff to examine and value the articles. The defendant refused to shew them; but it was arranged that they should return at five o'clock on the same day, which they omitted to do. The goods consisted of a mahogany table, a chest of tools of the value of 8*l.*, and other articles. The learned Judge ruled that the description in the schedule was insufficient; and that a mahogany table could not be considered as falling under the class of "necessaries."

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Thomas, Serjt., now moved for a new trial on the ground of misdirection.—The assignee has made no claim to this property. In *Lea v. Telfer* (*a*), it was held that silver spoons cannot be considered as necessaries for a person discharged under the insolvent debtor's act: but a mahogany table is not necessarily an article of luxury, it may not be worth ten shillings. The insolvent could not get access to the articles to make a full inventory of them. It is sufficient if he has described them according to the best of his ability.

POLLOCK, C. B.—There will be no rule. The question turns on the ninth section of the 7 & 8 Vict. c. 96, by which the wearing apparel, bedding, and other necessaries, and the working tools and implements of the petitioner and his family, not exceeding the value of 20*l.*, may be excepted by the petitioner from the operation of the Act. Perhaps these articles were such as might have been excepted. But

(*a*) 1 Car. & P. 146.

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then comes the proviso, that the excepted articles with the value thereof respectively, shall be fully and truly described by the petitioner in his schedule. Here, instead of a full description of the articles sought to be excepted, setting forth their value, there is a mere statement that they are "sundry articles of furniture deposited with another person, and worth, in the opinion of the petitioner, 15*l.*" The statute makes it the duty of the insolvent, not merely to state loosely the general character of the goods, but to specify each article, and state its value. If the excepted articles are not duly described, the statute provides that the exception shall be of no force as to any part of the same. I think that the verdict was right. It is absurd to suppose that the insolvent could not have described the articles more accurately.

ALDERSON, B.—I am of the same opinion. The reason for requiring the schedule to describe the articles fully, is to prevent such things as silver spoons being claimed as necessaries. The insolvent may have included things of that kind in the general description of furniture, for aught that I know. If each article is described, the Judge of the Insolvent Court can say whether it is "a necessary" or not.

MARTIN, B.—I agree with the rest of the Court. The policy of the law is, that on the discharge of an insolvent, all the particulars relating to his property, either retained by him or given up to his creditors, should be reduced into writing and set forth in his schedule. I think that the plea was proved.

BRAMWELL, B.—I am of the same opinion. The ninth section speaks of wearing apparel, bedding, and other necessaries. As to some of these articles I think it is doubtful whether they were necessaries.

Rule refused.

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POOLE v. GOULD.

May 8.

DALY had obtained a rule calling on the plaintiff to shew cause why the copy and service of the writ of summons issued in this cause should not be set aside for irregularity.

The ground of the application was, that the defendant was served with the writ of summons in the Court of Queen's Bench at Guildhall, whilst attending in obedience to a subpoena to give evidence in a cause in which he was plaintiff.

It is no ground for setting aside the service of a writ of summons, that it was served on the defendant whilst attending in a Nisi Prius Court, in obedience to a subpoena, to give evidence in a cause in which he was plaintiff.

Petersdorff shewed cause.—There is no authority that service of a writ of summons on a defendant in Court is irregular. [Alderson, B.—I have seen a subpoena served while a criminal trial has been going on.] There is no distinction in this respect between a subpoena and a writ of summons. If the writ cannot be served on a defendant in the Court, he ought to have the same privilege *eundo et redeundo*.—The Court then called on

Daly to support the rule.—The service of the writ was irregular. In Taylor on Evidence the learned author, after treating of the privilege from arrest of persons attending Courts of justice, says (a), “On the same principle it is deemed a contempt to serve process, even by summons, upon a witness in the immediate or constructive presence of the Court.” [Alderson, B.—The principle is not the same.] Also, in Archbold's Practice, it is said (b), “The writ cannot, it seems, be served upon a defendant whilst attending the Court upon any cause in

(a) Vol. 2, p. 1039, 2nd ed.

(b) Vol. 1, p. 174, 9th ed.

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which he is concerned.' The authority referred to in the text books is *Cole v. Hawkins*, which is reported by Strange (a), but more fully by Andrews (b). There a copy of a bill of Middlesex was served on the defendant whilst attending the Nisi Prius Court at Westminster in a cause wherein he was defendant, "and the whole Court (except *Page*, J., who hesitated), were clearly of opinion that the service of a process in the sight of the Court is a great contempt, and punishable by attachment." [*Martin*, B.—That was not an application to set aside the writ, but for an attachment against the attorney for a contempt of Court. *Alderson*, B.—The maxim applies: *quod fieri non debet factum valet*.]

Per CURIAM (c).—The rule must be discharged. Without giving encouragement to litigation or oppressive acts, we ought to take care that the service of process is not set aside on slight grounds. Every opportunity ought to be afforded to persons to serve debtors with writs.

Rule discharged.

(a) 2 Str. 1094. (b) Andrews, 275.
 (c) Pollock, C. B., Alderson, B., and Martin, B.

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TAYLOR v. EVANS.

April 29.

May 4.

COVENANT on an indenture whereby, in consideration of 1,380*l.*, the plaintiff granted to the defendant a coal mine for a term of fifty years, and the defendant covenanted to pay the plaintiff 1,380*l.* by certain yearly instalments of 150*l.* Breach—nonpayment of 75*l.*

Plea (*inter alia*) as to 5*l.* parcel, &c. (after setting out the covenant) (a).—That the sum of 75*l.* so alleged to be unpaid, and every part thereof, accrued due and payable after the passing of a certain act of parliament, &c. (18 & 19 Vict. c. 20), that is to say, that the same and every part thereof accrued due and payable for and in respect of the half year which ended on the 24th December, 1855, and not for or in respect of any other half year: that under and by virtue of, and in pursuance of the provisions of the said Act and of the other Acts therein mentioned or referred to, a certain sum of money (that is to say), the sum of 5*l.*, for and in respect of two quarterly instalments of taxes, to wit, income tax, was, under the provisions of the said Acts, charged and chargeable on and in respect of the yearly sum of 150*l.*, at the rate in the said Acts mentioned, and which two quarterly instalments were, before the commencement of this suit, paid by the defendant in respect thereof to the collector of the said taxes under the said statutes: that the said sum of 5*l.*, or any part

By indenture the plaintiff, in consideration of 1,380*l.* to be paid by instalments, granted and sold to the defendant a mine of coal for a term of fifty years; and the defendant covenanted with the plaintiff to pay him 150*l.* on the execution of the indenture, and 150*l.* per year after that time, whether a quantity of coal equal to that amount, at and after the rate of 100*l.* per Lancashire acre, should be got out of the mine in the same year or not; and when in any year so many coals should be got out of the mine as would, at the rate of 100*l.* for every Lancashire acre of coals, amount to more than 150*l.* per year, then that the defendant

would pay for every Lancashire acre of coal the sum of 100*l.*, and so in proportion for every greater or less quantity than an acre until the sum of 1,380*l.* should be paid: (it being the intent of the parties that the plaintiff should not, until the 1,380*l.* was paid, receive less than 150*l.* per year), the same yearly rents to be paid half-yearly on the 24th of June and 24th of December in each year. The defendant, who had never worked the mine, claimed to deduct from a half-yearly instalment a sum paid by him for income tax.

Held, that the instalment of 150*l.* per year was not "rent" within the meaning of the 60th section of the Income Tax Act, 5 & 6 Vict. c. 35; and that assuming it to be "an annual payment" within the meaning of the 102nd section, the plaintiff, and not the defendant, was liable to be assessed to the income tax.

(a) See the Covenant, *post*, p. 103.

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thereof, hath never been deducted or allowed by the plaintiff from or out of any payment by the defendant whatsoever, but the plaintiff hath always hitherto refused to allow the same to be deducted or allowed: that the sum of 75*l.*, which became and was due and payable on the 24th December, 1855, was subject and liable to have deducted therefrom the said sum of 5*l.* so paid by him; and that the defendant hath always been ready and willing, and offered to deduct and allow the same therefrom, and that no payment was made by the defendant to the plaintiff for or in respect of the said yearly sum or sums of 150*l.*, or any part thereof, after the said sum of 5*l.* was paid by him to the said collector.

Replication, taking issue on the plea.

At the trial, before *Pollock*, C. B., at the London sittings after last Hilary Term, it appeared that by an indenture made the 8th August, 1853, between John Taylor (the plaintiff), of the one part, and Edward Evans (the defendant), of the other part: after reciting that the said "J. Taylor is and now stands seised of or well and sufficiently entitled to the inheritance in fee simple of and in all and singular the farm, lands, hereditaments and premises hereinafter particularly mentioned, and the mines, veins and beds of coal lying within and under the same, free from incumbrances;" also reciting, "that J. Taylor hath contracted and agreed with and to the said E. Evans for the grant and assignment to him, for the term of fifty years, of that mine and bed of coal commonly called, &c. (describing it and its situation), at or for the price or sum of 1,380*l.*; subject, nevertheless, to deduction as hereinafter mentioned;" also reciting that, "upon the contract for the grant and assignment of the said mine, vein and bed of coal, liberties, privileges, &c., it was agreed that the said sum of 1,380*l.*, the purchase money, should be paid and advanced to the said J. Taylor at the times, by the instalments and in the manner hereinafter

mentioned :" it was witnessed "that in pursuance of the said agreement and in consideration of the sum of 1,380*l.*, to be paid and payable to the said J. Taylor, his executors &c., by the said E. Evans, by such instalments, and in such manner and form and subject as hereinafter, more particularly for that and those purposes, contained and mentioned " &c.; he the said "J. Taylor hath granted, bargained, sold, conveyed, assigned, transferred and set over, and by these presents doth grant, bargain, sell &c. unto the said E. Evans, his executors &c., all that mine, vein or bed of coal," &c.: habendum, from the day of the date thereof for fifty years. After covenants by the plaintiff for title, quiet enjoyment, &c., there was the following covenant by the defendant—" And the said E. Evans for himself, his heirs, executors &c., doth hereby covenant, promise and agree with and to the said J. Taylor, his heirs and assigns, by these presents in manner following, that is to say, that he the said E. Evans, his executors &c., shall and will well and truly pay or cause to be paid unto the said J. Taylor, his heirs and assigns, the sum of 1,380*l.* (being the purchase money for the said mine of coal), by the instalments and proportions, in the sums and in manner following, that is to say, the sum of 150*l.* on the execution of these presents, and the sum of 150*l.* per year after that time, whether a quantity of coal equal to that amount at and after the rate of 100*l.* per Lancashire acre shall be got and worked out of the said mine, vein or bed of coal hereby granted in the same year or not; and when in any year so many coals shall be got and worked from and out of the said mine, vein and bed of coal, as will at the rate of 100*l.* for every Lancashire acre of coal amount to more than 150*l.* per year, then that he or they shall and will pay or cause to be paid for every Lancashire acre of coal &c. so got or worked the sum of 100*l.*, and so in proportion for every greater or less quantity than

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an acre, for and during and until such time as by the means and in manner aforesaid the said sum of 1,380*l.* shall be paid, (it being the intent and meaning of the said parties that the said J. Taylor, his heirs and assigns, shall not, until by the means aforesaid the said sum of 1,380*l.* shall have been paid, receive less than 150*l.* per year); the same yearly rents or sums to be paid half yearly on every 24th day of June and 24th day of December in each year, and the first half yearly payment to be made on the 24th day of December now next ensuing: all which said several and respective payments shall be so made free and clear, and discharged of and from all levies, taxes, payments and deductions whatsoever of every nature, species and denomination, save and except property and income tax, if the same be liable to be charged or deducted by the said E. Evans, his executors, &c., upon or in respect of the said instalments as aforesaid." The present action was brought to recover a half yearly instalment of 75*l.*, due on the 24th December, 1855. The defendant had paid the collector 5*l.* for income tax due on the same day, which he now sought to deduct. The defendant had not commenced working the mine.

It was contended on the part of the plaintiff that, under the 5 & 6 Vict. c. 35, the defendant was not entitled to deduct the amount which he had paid. The learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him for 5*l.* if the Court should be of opinion that the defendant was not entitled to make the deduction.

Gray, in the present term, obtained a rule nisi accordingly.

Hugh Hill now shewed cause.—The question depends on the construction of the Income Tax Act, 5 & 6 Vict. c. 35,

the subsequent Acts having merely increased the rate of duty. The 60th section prescribes certain rules for assessing the duty in schedule A. No. I. is a "General rule for estimating lands, tenements &c., mentioned in that schedule," and it declares that "the annual value shall be understood to be the rack rent." No. III. contains "Rules for estimating the lands, tenements &c. hereinafter mentioned, which are not to be charged according to the preceding general rule:" it mentions "mines of coal, tin, lead" &c., which are to be assessed on an average of the profit for the five preceding years. No. IV. contains "Rules and Regulations respecting the said duties." By rule 9, "the occupier of any lands, tenements &c., being tenant of the same and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the Commissioners being first deducted) as a rate of seven pence for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent," &c., "and all landlords, both mediate and immediate, &c. shall allow such deduction upon receipt of the residue of the rent under the penalty herein contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had been actually paid unto the person to or for whom his rent shall have been due and payable," &c. Section 100 prescribes certain rules for assessing the duties in Schedule (D.), and it declares that such "duties shall extend to every description of property or profits which shall not be contained in either of the Schedules (A.), (B.) or (C.), and to every description of employment of profit not contained in Schedule (E.)," &c. Section 102 enacts, "That upon all annuities &c., or

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other annual payments &c., either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, &c., or as a personal debt or obligation by virtue of any contract," &c., there shall be charged a certain duty under Schedule (D.). The 103rd section imposes a penalty of 50*l*. on "any person who shall refuse to allow any deduction authorized to be made by that Act out of any rent or other annual payment mentioned in the ninth and tenth Rules of No. IV. Schedule (A), or out of any annuity or annual payment mentioned in Schedule (C.) or (E.), or in the next preceding clause." The money payable under this indenture is either "rent" within the meaning of the 60th section, or it is an "annual payment" within the meaning of the 102nd section. The plaintiff lets the mine to the defendant for a term of fifty years, at a certain rent per annum, which is to cease so soon as the payments amount to 1,380*l*. [*Martin*, B.—It is not rent: rent is something issuing out of land demised, and which is incident to the reversion. *Pollock*, C. B.—Suppose a person purchased, for 1,000*l*., a house for a term of ninety-nine years, and agreed to pay the purchase money by instalments at a certain sum per annum, such annual payments would not be rent.] This is a reservation of a certain sum in the nature of a royalty, and in respect of which the defendant is entitled to hold the mine. Rent issues out of each and every part of the land, so here the sum reserved issues out of each and every part of the mine, though the mode of calculating the payments is by the quantity of coal raised. At all events these are "annual payments," payable "as a personal debt or obligation by virtue of a contract" within the meaning of the 102nd section.

Gray, in support of the rule.—This is not rent, but what

is termed in the old books, "a sum in gross." There is no reddendum clause in the indenture. The transaction is, in effect, a purchase of the mine for fifty years for the sum of 1380*l.*, which is to be paid by instalments. The payments would not necessarily be the same every year. [*Pollock, C. B.*—They are certainly not rent: they could not be distrained for; and the only question is, whether they are "annual payments" within the meaning of the 102nd section.] Even assuming that they are, the assessment should have been on the plaintiff who receives them, and not on the defendant who pays them. The 102nd section imposes a duty of 7*d.* for every 20*s.* of the annual amount thereof, according to, and under and subject to the provisions by which the duty in the third case of schedule (D.) may be charged: provided, that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment," &c. These are not annual payments out of the profits or gains, for the defendant has never worked the mine. The proviso in the 102d section has reference to the case of a partner retiring from a firm, and receiving annual payments out of the profits of the partnership business. In such case the continuing partners are to pay the tax in respect of the whole profits and gains of the business, and to deduct from the annual payment to the retired partner his proportion of the tax.

POLLOCK, C. B.—The rule must be absolute. On considering the terms of the deed with reference to the provisions of the act of parliament, I am clearly of opinion that the defendant has no right to deduct this income tax.

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ALDERSON, B.—The defendant is not liable to be assessed, for he has never worked the mine. The plaintiff is primarily liable; but if the defendant works the mine and gets coal, then he must pay the tax, and deduct it from the payments made to the plaintiff.

MARTIN, B., concurred.

Rule absolute.

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#### MEMORANDUM.

In the preceding Vacation *Charles Jasper Selwyn*, Esq., of Lincoln's Inn, and *Hugh McCalmont Cairns*, Esq., of the Middle Temple, were appointed Her Majesty's Counsel.

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## EASTER VACATION, 19 VICT.

## IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

THOMAS v. BUTT.

May 12.

**T**HIS was a proceeding in error upon a special case. The facts and judgment of the Court below are reported 11 Exch. 235.

*Atherton*, (with whom was *Rudall*), argued for the plaintiff in error (a).—Ann Butt took neither an estate in fee nor an estate tail: therefore it must be an estate for life. The devise in the first instance is to Ann Butt, (in the will named Ann Preston.) That gave her an estate for life. It is not sufficient to point out ambiguous expressions in other parts of the will, which render it probable that the testator may have meant to give her a greater estate. The words are unambiguous, and to give them a meaning which is not their usual and natural meaning, the intention must be clearly expressed. The words “in case either of them die without issue that portion to be divided amongst the survivors” have not that effect. The testator joins Sarah and Jane in the gifts of personality: then he says, in case “either,” that is, “one of the two,” die without issue, her portion is to go to the survivors. The word “portion”

600*l.* 5 per cents. Also I give to my granddaughter Ann, 600*l.* 5 per cents. my two granddaughters S. P. and J. P., 400*l.* each, now on bond in the Bank of England. In case either of them die without issue that portion to be divided amongst the survivors.”

*Held*, that Ann took an estate tail in the house and land devised to her.

(a) February 5. Before Coleridge, J., Wightman, J., Cresswell, J., Erie, J., Williams, J., Crompton, J., and Crowder, J.

A testator by his will made in 1812, after giving his property to his wife “for her natural life,” devised as followed: “Also I give to my grandson R. P., that house, &c., with the garden now in the tenure of, &c. Also I give to my granddaughter Ann, the house I now live in with the garden, &c. Also I give to my two granddaughters S. P. and J. P. a house, &c. Also I give to the said S. P. and J. P. a piece of arable land now in the tenure of, &c., all to be equally divided. Also I give to my grandson R. P., Also I give to

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naturally refers to personality and not to realty. The estate is not an estate tail. To make it an estate tail it must appear that the testator contemplated an indefinite failure of issue : here the failure of issue is to be within the lifetime of four named persons. In *Pells v. Brown*(a) the testator being seised in fee, devised to Thomas and his heirs for ever, and if he died without issue, living William, then William to have the land : it was held that this was not an estate tail, but an estate in fee in Thomas, subject to an executory devise, upon the ground that an indefinite failure of issue was not contemplated. In *Greenwood v. Verdon* (b), there was a devise to A. and his heirs and assigns for ever, and from and after his decease without issue, to the survivors of certain ascertained persons, legatees under the will. It was held by Vice Chancellor *Page Wood*, that the failure of issue must be taken to mean a failure within the lives of the executory devisees, and that the estate of A. was not cut down to an estate tail. In that case it was said, that the testator having contemplated that some of the legatees would be living at the time when the failure of issue to which he referred should take place, it was not reasonable to suppose that he intended to refer to a general failure of issue. In *Trafford v. Boehm* (c), (which is shortly stated by Vice Chancellor *Wood* in *Greenwood v. Verdon*,) a person being entitled in reversion under a settlement, gave his real estate to his wife for life, without impeachment of waste, and after her death and failure of issue by him and the payment of his debts, to his sister for life, with remainder to several other persons for life, with remainder to his own right heirs. Lord *Hardwicke* decided the case on the ground that the testator evidently intended to give the reversion after the limitations in the settlement were determined, and, therefore,

- (a) Cro. Jac. 590. (b) 1 K. & J. 74. See p. 87.  
(c) 3 Ask. 440, cited 1 K. & J. 85.

fore, that the failure of issue referred to was a failure of issue during the lives of the parties mentioned in the limitations. He said that all the limitations over were for life, and, therefore, it was a reasonable construction to confine it to a failure of issue during the lives in being. [Williams, J.—Where there is a gift to A. for life, and if he dies without issue then over, does A. take an estate tail or an estail for life?] He takes a life estate only. [Williams, J., referred to *Jarman on Wills*, vol. 1, p. 464(a).]

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*Phipson*, for the defendant in error.—The words, “in case either of them die without issue, that portion to be divided amongst the survivors,” refer to all the subjects of the testator’s bounty. “Either” means one of two, or, one of any number: Webster’s Dictionary. “Portion” is not a technical word; it means simply “part” or “share.” The words point to an indefinite failure of issue. The first devise is of a life estate and there is a gift over in case of failure of issue. That must be construed as an estate tail, in order to give effect to the intention of the testator (b). The cases cited on the other side are cases where the first devise was in fee, with an executory devise over, and it was sought to cut down the estate in fee to an estate tail. This is not an executory devise. In *Roe d. Sheers v. Jeffery* (c), the distinction is adverted to by Lord Kenyon. Lord Denman, in *Doe d. Cadogan v. Eucart* (d), pointed out that it is doubtful if that case can be supported, and that the case of *Porter v. Bradley* (e), if supportable at all, is only so on the ground that the words “behind him” are introduced after the words leaving no issue.

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|------------------------------------------------------------------------|-------------------------|
| (a) 2nd Edition, by Wolstenholme & Vincent.                            | Wolstenholme & Vincent. |
| holme & Vincent. <i>Machell v. Weeding</i> , 8 Simons, 4.              | (c) 7 T. R. 589.        |
| (b) <i>Machell v. Weeding</i> , 8 Sim. 4; 1 Jarm. 464, 2nd Edition, by | (d) 7 A. & E. 636, 661. |
|                                                                        | (e) 3 T. R. 143.        |

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*Atherton*, in reply.—The contested passage has no reference to realty. As to the second point, it is true that the cases cited are cases where an estate in fee was first given; but there is no reason why the principle which governs them should not apply here. The cases of *Doe d. Smith v. Webber* (*a*), *Doe d. Jones v. Owens* (*b*), *Doe d. Johnson v. Johnson* (*c*), *Roe d. Sheers v. Jeffrey* (*d*), are all authorities which shew that this must be construed as an estate for life, with an executory devise over. The testator meant the dying without issue to be confined to a failure of issue at the death of the first taker, because the persons to whom the estate is given were then in existence. However one may speculate as to the probable intention of the testator the Court cannot do violence to the language and legal construction of the will. In *Addison v. Bush* (*e*) there was a bequest of residue to John L., but if he died in the lifetime of the testatrix, without leaving children, then to Charles L. John L. having died, leaving children, in the lifetime of the testatrix, it was held that the children of John L. took nothing by implication, though the testatrix evidently intended the children to take. *André v. Ward* (*f*) is to the same effect. [*Phipson* referred to *Bacon v. Cosby* (*g*).] The testator, in separate paragraphs of this will, deals with different portions of his property; and as it is mere matter of conjecture and by no means clear, that the words "in case either of them die without issue," (which are naturally connected with the clause relating to personality,) apply to anything but the bequest of money to Sarah and Jane; therefore, according to the case of *Doe dem. Ellam v. Westley* (*h*),

- (*a*) 1 B. & Ald. 713.
- (*b*) 1 B. & Adol. 318.
- (*c*) 8 Exch. 81.
- (*d*) 7 T. R. 589.
- (*e*) 14 Beav. 459.

- (*f*) 1 Russell, 260.
- (*g*) 4 De Gex & S. 261.
- (*h*) 4 B. & C. 667. See the judgment of *Bayley*, J.

the Court is bound to hold that they apply only to the clause with which they are so connected.

*Cur. adv. vult.*

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The judgment of the Court was now delivered by

**COLERIDGE, J.**—This was a special case, stated in order to procure the opinion of the Court of Exchequer on the construction of the will of Richard Barnes, in respect of a devise to one Anne Butt, formerly Anne Preston, now deceased, whose eldest son and heir-at-law, the defendant in error is. That Court decided that she took under it a greater estate than for her life in the premises sought to be recovered. But, with the exception of my brother *Martin*, the Judges pronounced no opinion as to the quality of that estate; he was of opinion that she took an estate tail.

The will is obscurely and inartificially drawn, and perhaps no construction can be made of it entirely free from difficulty; but after carefully considering the whole instrument, with a view to ascertain from the language used the intention of the testator, we find no reason sufficiently strong for holding that the conclusions of the Court below and my brother *Martin* are not the correct ones.

The testator had several parcels of real property, and some personalty, to dispose of. After a devise to his wife for life, he divides the two classes among four grandchildren, Richard, Anne, Sarah, and Jane; and he first devises tene- ments respectively to each in terms which, if they stood alone and unqualified, would pass only estates for life. He then bequeaths, in a sentence immediately following these devises, several sums of money in the funds or Bank of England—the bequests to Sarah and Jane being coupled together; “To my two granddaughters, Sarah and Jane, 400*l.* each now on bond in the Bank of England;” and

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then he adds—"In case either of them die without issue, that portion to be divided among the survivors." The question is upon the application of this clause; if it be limited to the four bequests of personalty, or to the two last, the devises of real property will stand by themselves and pass only estates for life; if it overrides these devises also, and they are to be read as if it immediately followed them, then it is sufficiently clear, from the provisions to take effect only on failure of issue, in some sense, that the estates were intended to be larger than for life. For it would be absurd to suppose an intent to divide among survivors, if no issue, and at the same time an intent that the estates should go to the heir-at-law if there were issue. There is nothing to prevent the more extended application of the clause, and it appears to us best to answer that intention to dispose of the whole interest which the will manifests. We therefore agree with the judgment of the Court below on this point.

But if Anne took a greater estate than one for life, we think it clear that she took an estate tail—for it appears to us that the intention was to give to each taker, and his or her issue indefinitely, the interest in his or her portion, and that the division was not to take place until failure of such issue. As we agree in the reasons assigned by Baron *Martin*, and as our opinion on the whole case is formed on a minute examination of the language used in the different parts of the will, it is unnecessary to go into the matter at length.

The judgment of the Court below will, therefore, be affirmed.

Judgment affirmed.



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## IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

SHEPHERD, Deputy-Master of the Trinity House, Deptford      May 12.  
 Strand, v. SHARP.

THIS was a proceeding in error on the judgment of the Court of Exchequer in the case of *Sharp v. Shepherd*. The fourth plea and the replication were similar to those in *Moore v. Shepherd* (a). After judgment for the plaintiff on demurrer to the replication, judgment was signed by the plaintiff for his costs of the demurrer. The plaintiff then discontinued the action, and the following entry was made :—"It is considered that the plaintiff do recover against the defendant 17*L* 3*s.* for the plaintiff's costs of the said demurrer, and the said judgment in that behalf: and afterwards on the 6th

By stat. 22 G. 3, c. 40, the harbour of Ramsgate was vested in trustees, upon certain trusts and subject thereto, was vested in and to be disposed of by the authority of parliament. Stat. 32 G. 3, c. 74, an "Act for the maintenance and improvement

of the harbour of Ramsgate," repealing the former Act, vested the harbour in trustees, who were empowered to impose duties on all ships passing Ramsgate, to be paid to the collector of the customs, &c., in the port whence such ships should set forth or where such ships should arrive. By s. 10, foreign ships are to pay the same rates as ships cleared out of British ports, such rates to be levied in any part of her Majesty's dominions. S. 11, empowers collectors to enter and measure ships, and imposes penalties on persons obstructing them. By s. 11, on producing his receipt for payment of duties, the master is entitled to an allowance from merchants or importers. By s. 13, accounts are to be transmitted to the receiver general of the customs. Sect. 15, gives power to collectors to distrain on nonpayment of duties. By s. 53, accounts are to be annually audited and submitted to parliament. By s. 72, penalties may be levied by distress and sale by the warrant of any Justice of the Peace in the town where the offender resides; and in case no sufficient distress is found, the Justice may commit the offender to prison. Held, in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that the 32 G. 3, c. 74, is an Act of a local and personal nature within the meaning of 5 & 6 Vict. c. 97, having a local object, the improvement of the harbour, and affecting only certain specified classes of her Majesty's subjects.

Statutes which, since the resolution of the House of Commons in 1801, have been printed by the King's printers amongst the public local and personal Acts, are statutes commonly called public local and personal within the meaning of 5 & 6 Vict. c. 97.

A defendant may bring error on a judgment for the plaintiff on demurrer to a replication to one of several pleas, though the plaintiff has subsequently discontinued the action except as to the costs of the demurrer.

(a) 10 Exch. 424.

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day of July, in the year of our Lord, 1855, it was by a rule of the Court, ordered that upon payment of the defendant's costs, to be taxed by one of the Masters of the Court, this action should be discontinued, the plaintiff thereby undertaking to pay the said costs to be so taxed, and consenting that, if they were not so paid within four days from the date of the master's allocatur, the defendant should be at liberty to sign judgment of non pros, and the said costs were afterwards taxed by H. Walton, Esq., one of the Masters of the Court, at twenty-two pounds and two shillings, and upon the said taxation the said costs of seventeen pounds and three shillings were not deducted from the defendant's costs, or otherwise allowed to the plaintiff; and the plaintiff paid the said sum of twenty-two pounds and two shillings to the defendant, and he discontinued this action, except as to his said costs, amounting to seventeen pounds and three shillings (a).

The case was argued in last Hilary vacation (February 5) by

Bovill, (with whom was *Norman*), for the plaintiff in error (b).—[*Crompton*, J. If there is a discontinuance, is not the cause out of Court? Can a writ of error be brought?] There is a judgment upon the record for the plaintiff below for the sum of 17*l.* 3*s.* The plaintiff claims to keep that judgment, and it may be enforced, notwithstanding the discontinuance. In *The Mayor, Aldermen, and Burgesses of Macclesfield v. Gee* (c) it was held that a writ of error might be brought on a judgment for the plaintiff on demurrer, notwithstanding a subsequent discontinuance of the action. [*Erle*, J.—The 3 & 4 Wm. 4, c. 42, s. 34,

(a) It was suggested by the Court that the above entry was imperfect, but it was arranged that the argument should proceed as if the judgment had been correctly entered up.

man, J., *Cresswell*, J., *Erle*, J., *Williams*, J., *Crompton*, J., and *Crowder*, J.

(c) 13 M. & W. 470. See also *Etcwood v. Bullock*, 6 Q. B. 383, 412.

(b) Before *Coleridge*, J., *Wight-*

makes the judgment on the demurrer a separate judgment for the costs. *Crompton, J.*—It seems a distinct and separate judgment, on which a writ of error lies, notwithstanding the action is put an end to by the discontinuance. *Williams, J.*—This case seems to me exactly like that of the *Mayor of Macclesfield v. Gee.*]

Then as to the main question. The Ramsgate Harbour Acts, 32 Geo. 3, c. 74 (a) and 55 Geo. 3, c. lxxxiv. are not Acts commonly called public local and personal, or local and personal, or acts of a local and personal nature, within the meaning of the 5 & 6 Vict. c. 97, s. 5. In order to ascertain the nature of the Acts in question, it is necessary to refer to

(a) By the 22 Geo. 3, c. 40, an Act for enlarging, &c. the harbour of Ramsgate, the docks and piers &c. were vested in trustees who might lease the same for 60 years, the rent to be applied to the enlarging and maintaining the harbour, and upon the expiration of the trust, and the determination of the leases, the property by that act vested in the trustees, was vested in and to be disposed of by the authority of Parliament. By stat. 32 Geo. 3, c. 74, the act 22 Geo. 3, c. 40, was repealed, and trustees were appointed, who are to impose duties on all ships passing from, to, or by Ramsgate, to be paid to the collector of Customs, or such person as should be appointed by the trustees to receive the same, in the port whence such ships should set forth, or where such ship shall arrive, before she sails from such port on her outward bound voyage, and before unloading the goods on board thereof on her homeward bound voyage. The duties are to be applied to the enlarging of the harbour of Rams-

gate. By sect. 10, reciting that foreign ships passing through, or being detained in the Downs will receive the same benefits as British ships, it was enacted "that such foreign ships shall be subject and liable at all times to the same rates and duties as ships cleared out of or entered in any of the British ports; such rates and duties to be levied and recovered in any part of Her Majesty's dominions, in the same manner as any of the rates and duties by the act imposed are directed to be levied and recovered. Section 11 empowers the collector of the duties to enter and measure ships, and imposes a penalty on persons obstructing them. By section 12, no vessel is to be cleared at the office of Customs, or allowed to enter without the production of a certificate of the payment of duties, and on producing receipt the master or owner is entitled to an allowance from the merchants or importers. By section 13, the collectors are to keep an account, and transmit copies of such account to the Receiver-

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the original Act, 22 Geo. 2, c. xl. It appears historically, that before the passing of that Act, a harbour of refuge was required at Ramsgate for the security of shipping in the Downs. The preamble of that Act recites "that whereas frequent losses of the lives and properties of her Majesty's subjects happen in the Downs for want of a harbour between the North and South Foreland, the greater part of the ships employed in the trade of the nation being under a necessity at going out upon, as well as returning from, their voyages, to pass through the Downs, &c., and as a harbour may be made at Ramsgate convenient &c., for carrying a work of such public utility into execution, and that the said harbour may be maintained as in such a manner as to be rendered of service to the trade and navigation of the nation: be it enacted," &c. The harbour is not for the accommodation of the vessels of the district, but for the benefit of the trade and navigation of the kingdom in general. It is not a matter of local interest, but one affecting all the Queen's subjects. All the provisions in the Act are consistent with the position that it is an Act of a public general nature. The trustees are the Lord Warden of the Cinque Ports—a high public officer appointed by the Crown, the Master and Deputy Master of the Trinity

General of the Customs. Section 15 gives power to the collector to distrain on nonpayment of the duties. By section 51, the real estate is vested in the Deputy Master of the Trinity House, who is constituted a corporation sole for the purpose of holding it. By section 53, the accounts are to be annually audited, and submitted to the House of Commons at the opening of the next session of Parliament. By section 72, penalties may be levied by distress and sale by the warrant of any

Justice of the Peace in the town wherein the offender shall reside, either on the confession of the party, or on information, on oath, which oath such Justice is required to administer, and in case of no sufficient distress being found, such Justice of the Peace shall and may commit such offender to prison. By section 78, actions are to be brought where the cause of action arises, and not elsewhere. By section 79, the act is declared public, to be noticed by all persons.

House, and others not connected with the locality. The meetings of the trustees are to be held in London. The trustees have power to impose tolls on all vessels that pass by Ramsgate. No such vessel can clear out of any custom house, in any part of the kingdom, without paying the Ramsgate harbour dues. Foreign vessels are liable to toll, though they may not put into any port in the United Kingdom. The accounts of the collectors are to be transmitted to the Receiver General of the Customs. The accounts of the trustees are to be laid before the House of Commons. By the 22 Geo. 2, c. 40, the docks, piers, &c. were vested in trustees, who had power to lease for sixty years, the rent to be applied to the enlarging, finishing, and repairing the harbour, and, upon the expiration of the trust, and the determination of the leases, the property by that Act vested in the trustees was to be vested in and disposed of by the authority of Parliament. The harbour is national property. An Act regulating the management of such property for national purposes cannot be said to be local or personal. By the 10th section of the 32 Geo. 3, c. 74, rates are imposed upon foreign vessels. These rates may be recovered, not in the United Kingdom only, but in any part of her Majesty's dominions. There are clauses of distress, and the power to distrain may be exercised in any port, not only within the United Kingdom, but even in the colonies. The 55 Geo. 3, c. lxxiv., appears to have been printed by mistake amongst local and personal acts. [Crosoder, J.—Looking at the matter historically, have you ascertained how the bill was brought in; as a private or a public bill? They are different matters altogether, they are referred to different committees.] The first bill appears to have been founded on a petition of the merchants of London, which was referred to a committee who made a report, and upon that, leave was given to bring in a bill. [Cresswell, J.—Some of the lighthouses were built under the provisions

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of acts of parliament, and others of charters only, but most of them in consequence of petitions by merchants and ship-owners. It would seem the most rational way to judge of the quality of an Act by its contents, and not by a mere arrangement about printing.] These Acts are Acts for the establishment and maintenance of a harbour of refuge. Acts relating to harbours of refuge, being for the benefit of navigation generally, have always, since the division of the statutes, been classed amongst the public general Acts. In the same year in which the 55 Geo. 3, c. lxxxiv. became law, the 55 Geo. 3, c. 191, was classed amongst the public Acts. That is “an Act to authorize the appointment of commissioners for erecting a harbour for ships to the eastward of Dunleary, within the port or harbour of Dublin.” [Cresswell, J.—Was that an Act brought in by the government?] We cannot tell. The 10 & 11 Vict. c. 24, is “an Act for the establishment of a harbour of refuge at Portland;” the 17 & 18 Vict. c. 44, “an Act for regulating and maintaining the harbours of Holyhead, and vesting them in the Admiralty;” the 17 & 18 Vict. c. 15, “an Act for making a tunnel from Keyham to Devonport,” all of which are classed among the public Acts. The harbour of Ramsgate was, by the 22 Geo. 2, c. 40, vested in Parliament, subject to the execution of the trusts, and by 32 G. 3, c. 74, is granted to the deputy master of the Trinity House as a trustee, for the benefit of all the Queen’s subjects. In *Barnett v. Cox*(a), it was held, that the Metropolitan Police Acts are not local and personal acts within the meaning of the 5 & 6 Vict. c. 97, s. 5. Lord Denman, C. J., in delivering judgment said, “It is contended that the statutes relating to the metropolitan police are either commonly called public local and personal, or are of a local and personal nature. They are not in our judgment of a local and personal nature within the meaning of that Act, considering the public importance of the rights

(a) 9 Q. B. 617.

that they maintain, and the generality of their application to all the Queen's subjects within the metropolitan police district." The Act now in question has even a wider application.—[He referred to *Com. Dig. Parliament (R.)* 6; *Jones v. Axen* (a); *Viner's Abridgment Statutes*, (C.); *Rex v. Pasolyn and others* (b).]—Acts relating to merchant ships are public Acts: so also Acts relating to pilotage, and the Act relating to bail bonds taken by sheriffs; *Samuel v. Evans* (c). There are two cases on the other side, *Cock v. Gent* (d), relating to the Sandwich Court of Requests, and *Richards v. Easto* (e). The first relates to a local jurisdiction, and in the other the question arose on the Building Act, which is essentially a matter of local regulation.

Unthank, (with whom was *H. Bullar*,) contrâ.—The 32 Geo. 3, c. 74, was passed before the existing division of acts of parliament was introduced. The 55 Geo. 3, c. lxxxiv. is classed among the local and personal Acts. The original Act, 22 Geo. 2, c. 40, contained a clause, that it should be deemed a public Act. The struggle has arisen from some notion that there is a greater dignity in public Acts than in public local Acts; but it is a mere question of words. The authority from which the rules found in *Viner* and *Comyn* are taken is *Holland's case* (f). Lord *Coke* there says, "though the Act as to persons is general, but the matter thereof concerns singular things, as any particular manor or house, &c., or all the manors, houses &c., which are in one or sundry particular towns, or in one or divers particular counties; these are such particular Acts whereof the Judges shall not take cognizance if they be not pleaded." When the resolution of 1797 (g) was passed, the notion that there were three classes

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- (a) 1 Lord Raym. 119.
- (b) 2 Siderfin, 208, 209.
- (c) 2 T. R. 569.
- (d) 12 M. & W. 234.

- (e) 15 M. & W. 244.
- (f) 4 Rep. 76 b.
- (g) See 15 M. & W. 251.

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of Acts seems to have been in the mind of the legislature. Public local and personal Acts are a subdivision of private Acts. [Williams, J.—In *Starkie on Evidence*, vol. 1, p. 274, it is said, “where a statute is not in express terms made a public statute, it is still such, with a view to evidence, if it be of a general and public nature affecting all the King’s subjects; therefore it has been ruled at the assizes that a statute so far as it related to a public highway was to be considered a public statute.”] The operation of the Building Act extends over a larger district than the London Police Acts.—Acts for works taken in hand by the government come within the same category as Acts relating to the king. (He referred also to *Law v. Dodd* (*a*); *Pilkington v. Riley* (*b*).)

Bovill replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—The question in this case arises on the demurrer to the replication to the fourth plea. This plea relies on a six months’ limitation imposed by the Ramsgate Harbour Acts, 32 Geo. 3 and 55 Geo. 3; the replication answers this by the 5 & 6 Vict. c. 97, s. 5, by which it is said this limitation has been repealed, and one of two years substituted. Whether this latter statute has such operation depends on whether either of the former statutes is an act of parliament commonly called “public local and personal, or local and personal,” or is an Act of a “local and personal nature;” for the operation of the section is confined to such.

The 32 Geo. 3 was passed before either the resolution of the House of Lords or that of the House of Commons,

(*a*) 1 Exch. 845.

(*b*) 3 Exch. 739.

under which the division of the statutes now observed was made by the Queen's printer; it is not therefore one of the Acts "commonly called" public local and personal, or local and personal. At the time of its being passed no Acts were commonly so called, but statutes were ordinarily divided into public or private, general or special. The 55 Geo. 3 was passed after the resolutions had come into operation, and it is printed among the local and personal Acts declared public, that is to say, among those which are local and personal, but which contain a clause enacting that they are to be deemed and taken as public, by virtue of which clause alone the Judges are bound to take notice of them without their being specially pleaded. As the 5 & 6 Vict. c. 97, distinguishes between statutes *commonly called* public local and personal, or local and personal, and those which *are* of a local and personal nature, and it is to be determined by the Court and not by the jury whether any particular statute is commonly so called (which in itself would seem to be a mere matter of fact), there seems to be no better ground on which this is to be decided than a reference to the statute-book itself; if we find it so printed under the directions of the legislature, we have the best grounds for saying that it is commonly so called: and this appears the more proper with reference to the 5 & 6 Vict. c. 97, s. 5, which, as to this part, is clearly framed with reference to the ~~resolutions~~, and to the division of statutes in the statute-book thereby introduced.

The question however remains whether the 32 Geo. 3, c. 74, is an act of a local and personal nature; for these words in the 5 & 6 Vict. were clearly intended to embrace statutes which are of that character, though passed before the resolutions were made, and the plea having alleged that the action was commenced and prosecuted for things done under both the acts, or *one of them*, and the replication not

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distinguishing between the two, but relying on the 5 & 6 Vict. c. 97, as having repealed the limitation clause in both, it is necessary for the plaintiff to sustain it as to both.

It appears to us, however, that this statute is in its nature local and personal: its object is local—the improvement of one specified harbour, the cleansing, amending, and preserving one specified haven; the duties of the functionaries employed under it are to be performed within certain local and specified limits, and it affects only certain specified classes of her Majesty's subjects—not all; those, namely alone—indeed, a part only of those who may navigate their vessels to, from, or by the single specified harbour. That this limited class may be numerous, or the interests of the individuals important, will not alter the nature of the Act which affects them. In *Richards v. Easto* (*a*), the 14 Geo. 3, c. 73, the Metropolitan Building Act, was held to be local and personal in its nature; and yet the number of persons, and magnitude of interests affected by it, very far exceed those affected by the statute now under consideration.

Our attention was drawn in the argument to cases of statutes for the construction of harbours of refuge, and other public works, on the part of the government. Such cases are clearly distinguishable, for the government interferes on the part of the public interests, and in these all the liege subjects are concerned. In *Barnett v. Cox* (*b*), the Metropolitan Police Acts were held not to be local and personal in their nature, and the correctness of this decision is questioned in *Richards v. Easto*. It is not necessary for us to consider whether that case was rightly decided, as it may be distinguished upon the ground just stated, namely, by reason of the public character which attaches to the administration of criminal justice, which

(*a*) 15 M. & W. 244.

(*b*) 9 Q. B. 617.

concerns all the liege subjects, and specially applies to all who may at any time be within the limits of the local jurisdiction.

On these grounds we think the judgment of the Court below should be affirmed.

Judgment affirmed.

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### IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

SHEPHERD, Deputy Master of the Trinity House, Deptford  
Strond, v. MOORE.

May 11.

ERROR on the judgment of the Court of Exchequer in the case of *Moore v. Shepherd* (*a*).—The first count of the declaration stated, that the defendant was sued as the nominal defendant for and on behalf of the trustees for carrying into execution the act of parliament, &c. (32 Geo. 3, c. 74), for the maintenance and improvement of the harbour of Ramsgate, in the county of Kent, and the several Acts for altering and amending that Act.—For that the said trustees seized, took, and carried away and converted to their own use, &c., a good and chattel of the plaintiff, that is to say, a mooring chain (*b*).

The 32 Geo. 3, c. 74, s. 14, which exempts coasting vessels from payment of duty to Ramsgate Harbour oftener than once in a year, includes coasting vessels carrying only coal.

Plea.—That a British vessel belonging to the port of

- (*a*) 10 Exch. 424, note (*a*).
  - (*b*) The declaration also contained a count for money had and received by the trustees for the use of the plaintiff; to which the trustees pleaded, (by statutes 32
- Geo. 3, c. 74, s. 78, and 55 Geo. 3, c. lxxxiv. s. 46), that they did not owe the money. Issue having been joined on this plea, it was tried before Williams, J., at the Southampton Summer Assizes, 1855, when a bill

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Sunderland, in the county of Durham, called the "Thomas and Margaret," of a burthen between 20 tons and 300 tons, to wit, 179 tons, and being a collier, before the committing of any of the alleged grievances, to wit, on &c., in the course of a voyage from Sunderland, in the county of Durham, to Southampton aforesaid, passed by Ramsgate in the county of Kent in manner mentioned in the act of parliament in the declaration first referred to, laden with coals, to wit, 972 chaldrons of coals, and afterwards and before the committing of any of the alleged grievances arrived at Southampton aforesaid so laden as aforesaid, and thereby terminated the said voyage. That before the commencement of the said voyage a rate or duty of one halfpenny per chaldron of coals had been settled and imposed by the said trustees in respect of coals laden and contained in such vessels as aforesaid, and passing by Ramsgate as aforesaid, to be paid by the master or owners of such vessels respectively; which said rate or duty was so settled and imposed by virtue and in pursuance of the powers, authorities, and provisions of the acts of parliament in the declaration referred to; and all acts, deeds, matters and things required to be done, observed, or performed for rendering such rate or duty valid had been fully done, observed and performed, and all notices required to be given in relation to such rate or duty had been duly given, of all which premises the plaintiff has always had notice. That after the arrival of the said vessel at Southampton aforesaid, the master of the said vessel and the plaintiff, who then was, and during the whole of the said voyage had

of exceptions was tendered to the ruling of the learned Judge, and which raised precisely the same question as that raised by the demurrer. The only material fact proved in addition to what appears

by the pleadings, was that up to the year 1853, the plaintiff and other shipowners had always paid the Ramsgate harbour dues on the coal carried by their vessels every time they passed Ramsgate.

been the owner of the said vessel, were respectively required by the said trustees to pay to them the rate or duty payable in respect of the said coals so laden in the said vessel, and so having passed by Ramsgate, which rate or duty amounted to a certain sum, to wit, 2*l* 0*s*. 6*d*., and no part of which had been previously paid; and after a reasonable time for the payment thereof had elapsed, the same still remaining wholly unpaid, the said trustees, by their collector duly authorized in that behalf, seized and took away from the said vessel the said mooring chain, then being part of the tackle of the said vessel, and carried away the same and impounded the same in a fit and proper place as and for a distress for the said rate or duty; whereof the plaintiff then had notice, and the said trustees kept the same as and for such distress until the sale thereof as hereinafter mentioned.—The plea then proceeded to state, that because the rate or duty was not paid ten days after the distress, the trustees, after the expiration of that time, sold the mooring chain and therewith satisfied the duty and costs of the distress.

Replication.—That the said vessel called the “Thomas and Margaret” for a long time before and thence continually until and at the time she so passed by Ramsgate, was a British coasting ship or vessel, that is to say, a British ship or vessel engaged in carrying goods or merchandize by sea coastwise or from one port in England to another port in England, and that the said voyage in which she so passed by Ramsgate was a coasting voyage from Sunderland, being a port in England situate to the northward of Ramsgate, to Southampton, being a port in England situate to the southward of Ramsgate. That after the commencement of the voyage in the plea mentioned, and in the same year in which the vessel passed by Ramsgate, the vessel being a British vessel and such coasting vessel, and laden with coals, passed by Ramsgate in the course of a coasting voyage from one port in England to another port in England:

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whereupon in respect of the said vessel so laden as aforesaid, and so passing by Ramsgate on the last mentioned voyage, there became due and payable to the said trustees a certain sum for the rate or duty then charged and payable under and by virtue of the acts in the declaration mentioned; that is to say, the rate or duty of one halfpenny per chaldron of coals, so settled and imposed as in the plea mentioned and then in force. That the plaintiff, being the owner of the said vessel, afterwards and before the said vessel passed, and within the same year in which she passed Ramsgate, paid to the said trustees at their request the said sum due and payable for the rate or duty aforesaid.

Rejoinder.—That the said vessel was a collier long before and during the whole of the year during which the voyage mentioned in the plea took place and was performed, and that during the whole of the year there were in force certain rates or duties per ton of the burthen (to be ascertained as by law directed for the purpose of charging such rates or duties) of British vessels passing by Ramsgate, and being of the burthen of 20 tons and upwards and not exceeding 300 tons, which rates and duties had been duly settled and imposed by the said trustees in pursuance of the said statutes, and were payable to the said trustees. That during the whole of the said year such last mentioned tonnage, rates or duties upon and in respect of a vessel of the burthen in tons of the vessel mentioned in the said plea, ascertained as by law directed for the purpose of charging such rates or duties, the said vessel being in fact of the burthen of 179 tons ascertained as aforesaid, exceeded the sum so paid by the defendant as in the replication to the said plea mentioned, to wit, by a sum of money not less than 3s.

Demurrer and joinder therein.

*Kinglake, Serjt., (Norman with him,) for the plaintiff in error (the defendant below.)—The question depends on the*

construction of the Ramsgate Harbour Acts, 22 Geo. 2, c. 40, and 32 Geo. 3, c. 74. The 8th section (*a*) of the latter Act imposes two classes of duties; one upon the ship irrespective of the cargo, the other upon the cargo irrespec-

(*a*) Enacts—"That the said trustees, or any such fifteen or more of them as aforesaid, at a public meeting (previous notice whereof shall be given in the London Gazette fourteen days as aforesaid,) are hereby authorized to settle and impose the several rates and duties hereinafter mentioned, which rates and duties shall commence and become payable from and after the 25th day of June, 1792, inclusive (until which time the rates and duties imposed by the said former act of Parliament shall continue payable;) that is to say, any rate or duty not exceeding 3d. per ton to be paid by the master or owners for every ship, vessel, or crayer of the burthen of 20 tons or upwards, and not exceeding the burthen of 300 tons, whether the same be laden or in ballast, passing from, to, or by Ramsgate, whether on the east or west side of the Goodwin Sands, or otherwise passing by or coming into the harbour there (other than and except ships laden with coals, grindstones, or Purbeck, Portland, or other stones,) not having a receipt testifying his payment before on that voyage; and for every ship, vessel, or crayer which shall exceed the burthen of 300 tons, any rate of duty not exceeding 1d. for each ton of such ship (except ships laden with coals, grindstones, Purbeck, Portland, or other stones;) and for every chaldron of coals, or ton of grindstones, Purbeck, Portland or other stones, a rate not exceeding three halfpence; and the said duties shall be paid every time such ship, vessel, or crayer shall sail from, arrive, or come into harbour at, or pass by Ramsgate as aforesaid (except as hereafter is mentioned;) and such rates or duties, when settled by the said trustees, shall be forthwith be published in the *London Gazette* for the information of all parties concerned; the same to be paid to the customer or collector of the Customs, or their deputies, or such other person or persons as shall be appointed by the trustees of this act to receive the same, in such port or place whence such ship, vessel, or crayer shall set forth, or where such ship, vessel, or crayer shall arrive, before she sails from such port on her outward-bound voyage, and before unloading the goods on board thereof on her homeward-bound voyage; the amount of the number of such tons to be ascertained according to the rules laid down by an act passed," &c. (26 Geo. 3, c. 60;) "and that the rates and duties so to be levied and raised as aforesaid shall be applied by, or under the direction of the said trustees, in or towards the enlarging, building, finishing, maintaining and supporting, and improving the said harbour of Ramsgate."

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tive of the ship. The 14th section (*a*) provides, "that no coasting vessel or fisherman shall pay the duty charged by that act oftener than once in any one year." That means the duty assessed on the ship, not on the cargo. The case of *Moore v. Shepherd* proceeded on the assumption that the Act imposed the duty on the ship, to be estimated in one case by the tonnage, in another by the cargo; and the only question was whether a ship laden with coal was a coasting vessel within the exemption of the 14th section. But it is submitted that the duties mentioned in the 8th section of 3*d.* and 1*d.* per ton are duties imposed on the *ships*, according to their tonnage; but with respect to vessels laden with coal, &c., there is a duty on the *cargo* of 1½*d.* per chaldron. The trustees are authorized to impose any rate, &c., "not exceeding 3*d.* per ton, to be paid by the *master or owners for* every ship of the burthen of 20 tons, or upwards" &c., "other than ships laden with coals," &c.; "and *for* every ship which shall exceed the burthen of 300 tons" 1*d.*, &c., "except ships laden with coals; and *for* every chaldron of coals" 1½*d.*, &c. And the duties are to be paid every time such ship, vessel, or crayer shall pass by Ramsgate, except as thereafter mentioned. In section 14, the duty on coals is expressly described as a duty on cargo. The proviso in the 14th section must be read as if incorporated with the 8th section; and the words "no coasting vessel shall pay," mean no coasting vessel shall pay the duty charged on her as a ship. There is a special exemption with reference to colliers; if they are laden, the cargo is subject to duty; if they return in ballast

(*a*) Sect. 14. — "Provided always, and it is hereby declared, that no coasting vessel, or fisherman, shall pay the duty charged by this act oftener than once in any one year; nor shall any collier returning in ballast from the French or Flemish coast, pro-

ducing a certificate of having paid the duty on her outward-bound voyage for her cargo of coals, be liable to the payment of any such duty for her inward-bound voyage; any thing hereinbefore contained to the contrary notwithstanding."

from the French or Flemish coast, they are not liable to duty for the inward-bound voyage. The 22 Geo. 2, c. 40, contains clauses, the words of which are similar to those of 32 Geo. 3, c. 74, ss. 8, 14. Those clauses are thus referred to in the preamble of the latter Act:—"Whereas the trustees, &c., were empowered to settle or impose certain rates and duties to be paid by the master or owner of every British or foreign ship, vessel, or crayer of the respective burthens therein mentioned (except fishermen and coasters,) for every loading or discharging a ship in ballast from, to, or by Ramsgate; and on every chaldron of coals or ton of grindstone, Purbeck, Portland or other stones, for or towards the enlarging, building, finishing, and maintaining Ramsgate Harbour." That is a parliamentary interpretation of the clause in the former statute. The manner in which the framers of the act must have understood the clause now in question was, that the exception in favour of fishermen and coasters only applied to duties charged on them as ships in respect of their tonnage, and that the duty on coals was a duty on the coal itself, not in any sense on the ship. Where the duty is imposed on the ship, it is payable whether the ship is laden or in ballast. The intention of the legislature was, that the burden should in all cases ultimately fall on the owner of the cargo, and to that end in the case of colliers no duty is imposed on the ships, but the duty is charged upon the cargo. Other provisions have been made to meet the difficulty that there would be, in the case of vessels laden with other cargoes, in dividing the amount of the duty amongst the different owners of different portions of the cargo. In the case of colliers the master pays the duty as agent for the owner of the cargo. If that is not so, the master and not the owner of the cargo must have to bear the burden of the duty on a cargo of the coal, though in

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case of all other cargo the master has the power to charge the owner of the cargo, on proving the payment of the duty. The 11th section empowers the collectors of duty to enter and admeasure ships in order to ascertain their tonnage. By section 12, no vessel whose destination shall be to or by, or who shall have sailed from or by Ramsgate, &c., shall be cleared at the Customs without producing a certificate of the payment of duty; and the owner is "entitled to an allowance from the merchant" for every ton of goods, or like sum per ton as by that act is charged upon the ship. That enactment is only applicable where the duty is paid upon the ship according to its burthen: no sum per ton is charged on a ship laden with coals; but the duty is charged on the coal itself by the chaldron. It may be urged that section 15 gives a power of distress upon the ship and its tackle, &c., not upon the cargo. But there are many acts of parliament which give a power of distress on the ship where the duty is specifically on the cargo. There are similar acts of parliament imposing duties on coals for the repair of harbours along the coast; for instance, those relating to Scarborough, Burlington, Whitby, Dover, &c., and in some cases the duty is charged on all coal shipped at the port of Newcastle or the different members of it.

*Montague Smith* (*Unthank* with him) appeared for the defendant in error (the plaintiff below,) but was not called upon to argue.

COLERIDGE, J.—This is in effect an appeal from the judgment of the Court of Queen's Bench in the case of *Moore v. Shepherd* (a), and I have heard nothing which induces me to think that judgment wrong. It is admitted that this vessel is a coasting vessel, and by section 14 a coasting vessel is only to pay duty once in a year. But

(a) 2 E. & B. 382.

then it is argued that this vessel is not within that provision, because, although a coasting vessel, she is carrying coal. It is said that no duty is imposed upon her as a ship, but only upon her cargo, and therefore she is not within that clause. But the 14th section declares that no coasting vessel shall pay the duty oftener than once a year, "nor shall any collier returning in ballast from the French or Flemish coast, producing a certificate"—of what? "of having paid the duty on her outward-bound voyage for her cargo of coals, be liable to the payment of any such duty for her inward-bound voyage." There is nothing inconsistent between this and the former part of the section; it only gives to colliers which are not coasters an exemption to which they would not otherwise be entitled; and the duty spoken of is a duty which the collier has paid before for her cargo of coal—not a duty imposed on the collier, but a duty imposed on her in respect of her cargo of coal. Then to return to the 8th section: with this remark, that it behoves those who seek to impose a duty to make out clearly that they have a right to do so. It is argued that the 8th section imposes two classes of duty; one on the ship irrespective of the cargo, the other on the cargo irrespective of the ship. There is no foundation for that assumption. The substance of the clause is, that duties are imposed equally on all vessels, and the distinction is only in respect of the amount. Where the burthen is 20 tons and not exceeding 300, there is one rate of duty, and where the burthen exceeds 300 tons there is another rate of duty; and then some ships are exempt from duty calculated by the actual burthen. Why that has been done I am not able to say, but no doubt there was good reason for it. However, that does not touch the main point, that the duty is in respect of the vessel. We are all of opinion that the judgment of the Court below must be affirmed.

Judgment affirmed.

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TRINITY TERM, 19 VICT.

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June 10.

HULL v. BOLLARD.

In an action for the infringement of a patent for a millstone, if the particulars of objections, delivered with the pleas in pursuance of the 15 & 16 Vict. c. 83, s. 41, are too general, the party who means to object to them must procure an order for better particulars. The Act does not prevent defective particulars from being available at the trial, and the plaintiff cannot resist the admission of evidence, which is within the literal meaning of the particulars, on the ground

**ACTION** for the infringement of a patent for a millstone.  
Pleas.—First, that the plaintiff was not the true and first inventor of the said improvements, &c. : Secondly, that the said improvements were not a new invention as to the public use and exercise thereof within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man.

With the pleas particulars of objections were delivered, which, so far as they related to the first and second pleas, were as follows:—Take notice that the defendant relies on the following objections to the validity of the patent in the declaration mentioned.—First, that the plaintiff was not the true and first inventor of the improvements therein mentioned; Secondly, that the improvements therein mentioned were not, nor was any part thereof, new at the time of granting the patent, and that the same had been generally known and publicly used in corn mills for many years previously.

that the statement is too general, and that the particulars do not give the required information as to the place in which the invention is alleged to have been used.

At the trial, before *Martin*, B., at the last Liverpool assizes, two witnesses having been called to prove that the invention had been in use before the date of that patent, in mills in Cheshire; the plaintiff's counsel urged that the particulars of objections were insufficient under stat. 15 & 16 Vict. c. 83, s. 41. The learned Judge received the evidence, and the jury having stated that they were satisfied that the invention was not new, the plaintiff was nonsuited.

*Edward James* in Easter Term obtained a rule to shew cause why the nonsuit should not be set aside and a new trial had, on the ground that the learned Judge ought not to have admitted evidence of any publication or user by other persons prior to the patent, the particulars of objections being insufficient.

*Hugh Hill* and *Crompton Hutton* (*a*) now shewed cause.—The plaintiff should have applied for an order for better particulars; that was the course taken in *Palmer v. Wagstaffe* (*b*). The defendant meant to rely on proof of a general user; he was prepared to call witnesses who had used the invention in Bedfordshire and Huntingdonshire. A very general statement is sufficient. In *Palmer v. Wagstaffe* (*b*) the particulars stated a user by candlemakers in London and its vicinity, and the Court refused to order better particulars to be given. The only question at the trial is, whether words of the particulars are large enough to let in the evidence; *Neilson v. Harford* (*c*) [*Hindmarch*.—That case occurred under 5 & 6 Wm. 4, c. 83, s. 5, which only requires a notice of objections, not particulars.] The plaintiff has misled the defendant by lying by, and not objecting to the notice before the trial. Unless the objection is strictly of right the present rule should be discharged. The notice of objections tells the plaintiff that the invention

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(*a*) May 22. Before *Pollock*, C. B. and *Martin*, B.
(*b*) 8 Exch. 840. (*c*) 8 M. & W. 806.

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has been used in corn mills generally. Here the irregularity, if any, was waived by notice of trial, after the delivery of the particulars.

*Edward James and Hindmarch*, in support of the rule.—The object of requiring particulars of objections is to enable the plaintiff to inspect the machine which is alleged to be identical with that patented by him. In *Palmer v. Cooper* (*a*) it was held that unless the particulars contain a statement of the place in which the invention is alleged to have been used the evidence is not receivable. [*Martin, B.*—In *Ibbott v. Leaver* (*b*), *Parke, B.*, treated strict compliance with an order for particulars of set-off with dates, as a condition precedent to the right to give evidence under the plea of set-off at the trial. That is opposed to *Wallis v. Anderson* (*c*), in which Lord *Tenterden* considered that the taking a fresh step was a waiver of the irregularity in the delivery of the particulars.] Here the particulars do not afford the plaintiff the means of ascertaining the identity of his invention with that referred to by the defendant. Neither the place in which the invention is alleged to have been used nor the manner of using it is stated. [*Pollock, C. B.*—The substance of the particular is, that the invention has been used generally all over England in corn mills for grinding corn. It cannot be said that it does not in some degree point out both place and manner, though if there had been an application for better particulars I should not have held it sufficient. The Act requires that the place and manner in which the invention is alleged to have been used should be stated; if that is in any degree complied with, the plaintiff should not go down to trial, and if he fails, seek to take advantage of the defect. It is otherwise if no notice at all is given.]

- (*a*) 9 Exch. 231.                    (*b*) 16 M. & W. 771.  
 (*c*) Moo. & M. 291.

Even if the particular is sufficient to let in some evidence, the defendant was not entitled to give evidence under it of a specific user in particular places, but only of a general use. Here there was no evidence of any general use.

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Cur. adv. vult.

POLLOCK, C. B., now said.—In this case, which was an application for a new trial in a case tried before my brother *Martin*, we are all of opinion that the rule must be discharged. The action was brought for the infringement of a patent for a millstone. When it was proposed to give in evidence the fact, that the same invention had been in use before the date of the letters patent, the plaintiff's counsel urged that the particulars of objections were not so framed as to render this evidence admissible. The 15 & 16 Vict. c. 83, s. 41, provides that the defendant “shall deliver with his pleas” “particulars of any objections on which he means to rely at the trial in support of the pleas,” “and at the trial no evidence shall be allowed to be given in support” “of any objection impeaching the validity of such letters patent which shall not be contained in the particulars.” We are all of opinion that if the evidence is within the literal meaning of the words of the particulars, however general the statement, the evidence should be received at the trial. If the particulars are too general, it is the business of the party who means to object to them to bring the case before a Judge at Chambers, and procure an order for better particulars. It is true that the statute contains a proviso that the place or places at which the invention is alleged to have been used shall be stated, but that proviso does not prevent particulars not containing such statement from being available, if not objected to on that ground before the trial.

Rule discharged.

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May 22.

BRENNAN v. HOWARD.

Though by the Common Law Procedure Act, 1854, c. 96, a Judge on the trial is bound to make such amendments as are necessary for determining the real question between the parties, and the Court has power to review his decision in refusing an amendment, if injustice has been done by such refusal, yet the Court in general will not interfere to control the exercise of the Judge's discretion.

Sensible, that the proper course is for the party aggrieved by the Judge's refusal to amend, to make an application to the Court for leave to amend.

An action having been brought on a contract to convey smuggled goods to New York, the Judge at the trial refused an amendment, saying he would not assist the plaintiff to enforce a contract to defraud a foreign government. The plaintiff was nonsuited. A rule to set aside the nonsuit or for a new trial, on the ground that the Judge ought to have allowed the amendment, was discharged.

THE declaration stated, that in consideration that the plaintiff would deliver to the defendant in Liverpool, certain silk goods packed in hampers, to be conveyed to the store of the plaintiff in New York: and would pay to the defendant the sum of 7*l.* upon each hamper, the defendant would cause the goods to be shipped on board vessels at Liverpool, and conveyed to New York, and there delivered at the warehouse of the plaintiff free of further charge; that the goods were delivered to the defendant by the plaintiff to be conveyed to New York upon those terms: but that though plaintiff had done all things necessary to entitle him to have the said goods delivered at New York, and although a reasonable time for such delivery had elapsed before the commencement of the suit, yet the defendant had not delivered the goods in New York.

Plea.—That the plaintiff had not paid the sum of 7*l.* in respect of each hamper.

At the trial before *Willes*, J., at the last Liverpool assizes, it appeared that the silk was packed in porter hampers; and the object was to escape the payment of duty to the government of the United States. At the conclusion of the plaintiff's case his counsel applied for leave to amend the declaration by stating, that the 7*l.* for each hamper was to be paid "on advice of the safe delivery thereof at the plaintiff's warehouse in New York being received by the plaintiff;" and by adding, after the words further charge, "and duty." The learned Judge refused to allow the

amendment on the ground that it would assist the plaintiff in enforcing a contract, the object of which was to defraud a foreign government, and the plaintiff was nonsuited.

Atherton, in Easter Term, obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had, and why the plaintiff should not be at liberty to amend the record, or why a new trial should not be had, on the ground that the learned Judge ought to have allowed the amendment.

Edward James and *Brett* now shewed cause.—The Court will not interfere if the Judge refuses to make an amendment. The 3 & 4 Wm. 4, c. 42, s. 23, empowers the Court to interfere only where they think the amendment improper. Under the Common Law Procedure Act, 1852, sect. 222, the Judge has a discretion to allow or refuse an amendment: *Ritchie v. Van Gelder* (*a*); and though section 96 of the Common Law Procedure Act, 1854, says, that amendments shall be made, *if duly applied for*; the Court will put the same construction on both statutes. [Martin, B.—If in *Ritchie v. Van Gelder* the argument was right, a defendant might keep back his defence, and put it upon the record at the trial: that never could have been the meaning of the Act.] The amendment must be such as to enable the parties to try the question they went down to try (*b*). When a discretion is given to a Judge, the Court will not control its exercise. Hardly any two minds form the same opinion on matters of discretion (*c*). The Judge did not decline jurisdiction as a magistrate does who refuses to hear a complaint: he did exercise his discretion after hearing the whole case.

(*a*) 9 Exch. 762.

(*b*) *Wilkin v. Reed*, 15 C. B. 192.

(*c*) They referred to *Rex v.*

Archbishop of York, 1 A. & E. 394; S. C. 3 N. & M. 453.

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*Atherton*, in support of his rule.—This application is under the Common Law Procedure Act, 1854, c. 96. Some force must be given to the imperative words of that section. [Pollock, C. B.—It seems impossible to deny that the Court has power to interfere, where any real injury has been done by refusing an amendment. If it should appear on the trial of a cause, that the defendant had a perfectly good defence to the action, but the pleadings did not raise the question, and the Judge refused to amend, the Court would grant a new trial.] Such amendments as that sought to be made have been made under 3 & 4 Wm. 4, c. 42; *Whitwell v. Scheer* (a). The plaintiff complains that the Judge, entertaining a strong disapproval of the action, abstained from deciding whether the amendment was necessary for determining the real question in controversy. The plaintiff asks to be allowed to go down to another trial upon the record as it stands, and then the Judge who may try the cause will determine whether the amendment sought to be made is one raising the real question. In *Doe v. Edwards* (b), Parke, B., said, that he did not think that the supposed impropriety of the action was a consideration which ought to influence him in deciding whether he would give leave to amend. [Pollock, C. B.—There is a distinction between an action founded on an odious, though legal right, and one founded on a breach of morality or law.

Pollock, C. B.—I am of opinion that the rule must be discharged. It may be, that a substantive application might have been made to the Court for leave to amend, as suggested by the Lord Chief Justice of the Common Pleas, in *Wilkin v. Reed* (c). This, however, is an application to review the decision of the Judge at nisi prius. We have

(a) 8 A. & E. 301.

(b) 1 Moo. & Rob. 319.

(c) 15 C. B. 200.

of necessity a power to review every such decision, and to do whatever is necessary to ensure substantial justice; and for that purpose we might interfere in many cases where we do not ordinarily interfere, for instance, we might grant a rule for a new trial after the fourth day of term: but I think it is for the Judge to exercise his discretion; and, as a general rule, we ought not to interfere.

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MARTIN, B.—I am of the same opinion. The object of the clause undoubtedly was, that the real question in controversy should be tried. There is nothing in the Act which expressly gives us power to interfere with the exercise of the discretion of the Judge at nisi prius. This is an appeal from the refusal of the Judge to make an amendment. Whatever it was that operated upon his mind, and induced him to refuse to amend, he has exercised his discretion, and I do not think that any ground for a new trial has been established. It is the duty of every Court to work out real justice, and if I were satisfied that injustice had been done, I should think that a new trial ought to be granted; but the plaintiff's counsel has not put this case upon that ground.

BRAMWELL, B.—I incline to the opinion, that the Judge is bound by the 96th section of the Common Law Procedure Act, 1854, to make amendments where they are necessary to try the real question. I agree with *Parke*, B., that we ought not to refuse to make amendments upon any notion that actions are contrary to public morality. But if the Judge is bound by law to make such amendments, how can we interfere,—simply by granting a new trial? If so we should only be sending the parties down to try a question which is not that in dispute. There is a better remedy; if the Judge at the trial refuses to amend, the

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party aggrieved by such refusal should come to the Court and make a substantive application for an amendment, and ask the Court to grant it by virtue of its general jurisdiction. It seems to me that there is no necessity for any express power to review the decision of the Judge at nisi prius.

Rule discharged.

May 24.

GURNEY v. HALLEN.

A defendant ordinarily residing at K. was arrested in Suffolk and lodged in gaol at Bury, which is 180 miles distant by railway from K. He filed his schedule in the Insolvent Debtors Court, and the petition was referred to the County Court of Suffolk. Having been brought up to the prison of the Court by habeas corpus at the suit of the plaintiff, the Court refused to remit him to the custody of the sheriff of Suffolk.

*Sembles*, that it is the right of a plaintiff to remove a defendant in custody to the prison of the Court in which the action has been brought.

THE defendant, who resided at Kidderminster, had been arrested under a writ of ca. sa., at the suit of the plaintiff, in the county of Suffolk, and lodged in the gaol at Bury St. Edmunds, in that county. On the day on which he was arrested he signed his petition to the Court for the relief of insolvent debtors, and the same was filed on the 5th of May. A vesting order obtained on the 6th of May, and an order was afterwards made referring the petition to the County Court of Suffolk at Bury St. Edmunds. The names of seventy-four creditors were inserted in his schedule. His creditors resided principally at Kidderminster. Kidderminster is distant from Bury St. Edmunds about 180 miles by railway. It was alleged that defendant went to Bury for the purpose of being arrested. On an affidavit of these facts a writ of habeas corpus had been obtained, and the defendant had been brought up to this Court.

*Prentice* now moved for a rule to shew cause why the defendant should not be remitted back to the custody of the sheriff of Suffolk—*Williams v. Jones* (a) decided that where a defendant was in execution in a county gaol the plaintiff was not, as of right, entitled to a habeas corpus to

(a) 2 C. & J. 611.

remove him to the custody of the Warden of the Fleet. In Tidd's Practice, p. 348 (*a*) it is said that "the plaintiff is at liberty to remove the defendant by writ of habeas corpus cum causâ to the custody of the Marshal or Warden at any time before or after judgment." But the reason of that practice was, that formerly the plaintiff could only proceed in the action by bringing up the defendant to the prison of the Court in which it was commenced, for the purpose of declaring against him. The 4 & 5 W. & M. c. 21, s. 3, altered that mode of proceeding. *Bayley*, J., in delivering the judgment of the Court in *Williams v. Jones*, pointed out that it would be a great hardship to open the prison of the Court to all prisoners in the county prisons at the option of execution creditors. The habeas corpus is of right for the defendant, and not for the plaintiff. The Insolvent Debtors' Act empowers the Court to remove the defendant where he is improperly before a particular Court in the county (*b*). Here the Insolvent Debtors' Court has referred the petition to the County Court of Suffolk.

**MARTIN, B.**—If a plaintiff desires to take a defendant in execution under a writ of ca. sa., and keep him in the prison of the Court, he must arrest him wherever he can find him, and then remove him by habeas corpus to the prison of the Court. In the case of *Bettesworth v. Bell* (*c*), *Wilmot* J. pointed out that the plaintiff had, at common law, a right to remove the defendant, and that such right was not affected by the 4 & 5 W. & M. c. 21, s. 3. There is nothing in *Williams v. Jones* to shew that the habeas corpus issued improperly in the present case.

Rule refused.

(*a*) Citing Anon. *Say. 154*; (*b*) See 1 & 2 Vict. c. 110, *Bettesworth v. Bell*, 3 *Burr. 1875*; s. 94.  
Anon. 1 *Salk. 353*; *White v. Haugh*, 2 *Stra. 1262*. (*c*) 3 *Burr. 1876*.

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*May 26.***GORELY v. GORELY.**

Declaration on the statute 4 Anne, c. 16, s. 27, by one tenant in common against another for not accounting for rent received by him.  
**Plea:**—That before the receipt of the rents, the plaintiff and defendant, by indenture, demised the premises to W. for a term of 500 years, which by divers mesne assignments vested in the defendant.  
**Equitable replication:**—That the indenture was a mortgage to secure a sum of money and interest; that the defendant received more than sufficient to pay the mortgage debt, interest and costs, and he accordingly paid the same.

*Held,* that the Court could not deal with the replication, since they had no power to compel a re-conveyance; therefore they ordered it to be struck out.

**HARCOURT** had obtained a rule calling on the plaintiff to shew cause why the equitable replication pleaded in this case should not be struck out.—It was an action of account upon the statute 4 Anne, c. 16, s. 27. The declaration stated that the plaintiff and defendant were seised in their demesne as of fee as tenants in common of and in certain messuages, lands, &c.; that is to say, the plaintiff was seised in his demesne as of fee, of and in one undivided moiety thereof, and the defendant was seised of his demesne as of fee, of and in the other undivided moiety thereof; and the defendant had the care and management of the whole of the premises, to receive and take the rents thereof, and, as the bailiff of the plaintiff of what he received more than his just share and proportion, to render a reasonable account thereof to the plaintiff, according to the form of the statute: that although the defendant received more than his just share and proportion of the rents and the plaintiff's share thereof, yet he hath not rendered any account to the plaintiff.

**Plea.**—That before the alleged receipt by the defendant of the rents of the said messuages, lands, &c., the plaintiff and defendant, being so seised in their demesne as of fee as tenants in common, by a certain indenture demised the said lands and premises to one Catherine Witherden, widow, to hold the same unto the said C. Witherden, her executors &c., during the term of 500 years from the 21st October, 1837, and afterwards and before any receipt by the defendant of the rents, &c., the said term by divers mesne assignments of law came to and was vested in the defendant, who then was, and thence hitherto hath been and still is in the actual

possession of the said messuages, &c., and the said term is still undetermined.

**Equitable replication.**—That the indenture whereby the plaintiff and defendant demised the said lands and premises to C. Witherden was a mortgage security to her from the plaintiff and defendant to secure to her 2,000*l.* and interest; and that notwithstanding such mortgage, the defendant, long before and for many years after such mortgage was executed, had during all that time the sole care and management of the whole of the premises in the mortgage contained, to receive and take, and did during the whole of that time receive and take the whole of the rents thereof as the bailiff of the plaintiff: that whilst the defendant was so in the receipt of the whole of the rents, and before this suit, he received thereout and therefrom much more than sufficient to pay off the said mortgage debt of 2,000*l.*, together with all interest, costs and expenses incident thereto; and that he did accordingly before this suit pay off the same; but that he hath remained in sole possession and perception of the whole of the said rents, as such bailiff of the plaintiff, up to the commencement of this suit; yet the defendant, although he received more than his just share and proportion of the said rents, over and above what was sufficient to satisfy the mortgage debt and interest, hath not rendered a reasonable or any account to the plaintiff of the same, or any part thereof, or of the share of the plaintiff, after satisfying the charges aforesaid.

*Tapping shewed cause.*—By the 85th section of the Common Law Procedure Act, 1854, “the plaintiff may reply in answer to any plea of the defendant facts which avoid such plea on equitable grounds.” This replication affords a good equitable answer to the plea, and therefore the plaintiff is entitled, under that section, to plead it.

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[*Pollock*, C. B.—We cannot deal with the replication so as to do justice between the parties; for assuming all the facts stated in it to be true, there would be a term of years which ought to be surrendered, and we have no power to order a surrender. Therefore if the Court gave judgment for the plaintiff on this replication, that would not terminate the matters in difference between the parties. *Bramwell*, B.—It is impossible for us to deal with a matter of this kind, where a reconveyance is required.]

*V. Harcourt* appeared in support of the rule, but was not called upon.

Per CURIAM (a).—The rule must be absolute.

(a) *Pollock*, C. B. and *Bramwell*, B.



May 27

#### SYMONDS and Others v. ATKINSON.

A., the acceptor of a bill, had agreed with his creditor to pay a composition partly in money and partly in notes. The bill having become due the drawer was unable to take it up, but the indorsee entrusted it to the drawer to get the composition in money and notes for him.

**T**ROVER for a bill, with a count for money had and received.—Pleas—not guilty: never indebted.

At the trial, before *Willes*, J., at the last Liverpool assizes, it appeared that a bill for £524 8s., drawn by Messrs. John Barton & Co., and accepted by Messrs. Ainsworth, Sykes & Co., had been indorsed to the plaintiffs, and discounted by them for Messrs. John Barton & Co. Before the bill became due Messrs. Ainsworth, Sykes & Co. stopped payment, and ultimately made a composition with their

composition in money and notes for him. The drawer handed it to his attorney with other bills accepted by A., to get the composition for him, and at the same time obtained an advance of 200*l.* from the attorney. The attorney obtained the composition in money and repaid himself the 200*l.*, and carried the balance to the account of the drawer. For the composition in notes he took one note for the aggregate amount of the composition on the several bills handed to him.

*Held*, that the attorney was not liable to the indorsee either in trover for the bill, or for the money kept back by him to repay the advance to his client, the drawer.

creditors, by which it was arranged that they should pay 13*s. 4d.* in the pound upon their debts, viz. five shillings in cash, and the remainder by promissory notes at various dates, payable to the order of John Barton, and indorsed by him in all cases in which his name was on the original bills. Messrs. John Barton & Co. were unable to take up the bill in question when it became due. Upon the day appointed for the payment of the dividend by Messrs. Ainsworth, Sykes & Co., John Barton called on the plaintiffs, saying that he was going to get a dividend, due to his firm, from Messrs. Ainsworth, Sykes & Co., and inquired if he should get the dividend on the bill for £524 8*s.* The bill was intrusted to him by the plaintiffs, in order to enable him to fetch the dividend, and for no other purpose. The plaintiffs did not know that Barton was to execute the deed of composition; and they said that, if necessary, they would have gone and signed it themselves. Some of the creditors got their dividend without signing the deed. The bill had been indorsed by the plaintiffs to Loyd, Entwistle & Co., and by them to Jones, Loyd & Co. The indorsements, except that of Barton, were struck out before the bill was redelivered to Barton.

The defendant, an attorney, acted for Barton in his arrangement with Ainsworth, Sykes & Co. On the 15th of January, 1855, Barton brought him the bill, saying, that the plaintiffs would have nothing to do with Ainsworth, Sykes & Co., and that he had arranged with the plaintiffs by giving them copper rollers and a bill for £350. The dividend was to be paid on the 18th. On the 17th Barton came to the defendant and obtained from him £200, in anticipation of the dividend to be received the next day. The defendant received the dividend, and a promissory note for the remainder of the composition on this and other bills placed in his hands by John Barton & Co. The

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defendant executed the composition deed. On cross-examination, the defendant said that he believed that the bill was Barton's; he received it from him as his; he arranged the proofs for Barton's benefit; he debited Barton with the £200 advanced on the 17th, and gave him credit for the dividend received on the next day. He saw that the plaintiffs had been the holders of the bill.

The learned Judge thought that the plaintiffs were not entitled to recover, and under his direction the jury found a verdict for the defendant, liberty being reserved to the plaintiff to move to enter a verdict for such amount, if any, as the Court might think proper; the Court to have power to draw any inferences of fact.

*Hugh Hill*, in Easter Term obtained a rule accordingly, on the grounds that the evidence shewed a conversion by the defendant of the bill, or that the plaintiffs were entitled to recover on the Court for money had and received.

*Knowles* now appeared to shew cause; but the Court called on

*Hugh Hill* and *Manisty*, in support of the rule.—The plaintiffs, the holders of this bill, entrusted it to Barton to enable him to receive the dividend, to be paid in a particular way, viz. five shillings in the pound in cash, and the remainder of the composition in notes. While the bill was thus in Barton's hands for a special purpose, in violation of his trust he pledged it to the defendant for £200. This money the defendant lent him, believing the bill to be Barton's. The defendant then claimed to be entitled to receive the dividend on the bill; but Barton could give him no title. The defendant treated the bill as his own; he mixed it up with his own. He received the dividend on it. He took a promissory note for the residue of the dividend on all the notes in his hands,—not such

a note as Barton could have indorsed to the plaintiffs. There was then a clear conversion. The property in the bill was never out of the plaintiffs. At every step the bill was employed for purposes different from that for which it was entrusted to Barton. In *Perkins v. Smith*, (a) it was held that trover lies against a servant who disposes of the property of another to his master's use. *Stephens v. Ehoall* (b) is to the same effect. [Pollock, C. B.—Suppose a person carrying on business obtains a cheque improperly, and hands it over to his servant, who receives the money for it, is the servant liable in trover? According to *Stephens v. Ehoall*, any mere carrier of the cheque would be liable.] That is the case of a person acting as the mere tool or implement of another. Here the defendant assumed to have an interest in the bill. In *Cranch v. White* (c), the defendant acted as clerk to his mother, a coal merchant. One Roberts who was employed to get a bill discounted, having brought it to the defendant, and being indebted to the defendant's mother, the defendant carried the bill to Roberts' account with her, and was held liable in trover. Here the defendant having taken the bill after it became due, and subject to all its equities, could not apply the proceeds to the payment of a debt due from Barton to himself. In *Seal v. Dent* (d), bills were remitted for sale to Oswald, Seal & Company, the proceeds to be applied to a specific purpose. Oswald, Seal & Company having, in violation of such purpose, transferred them to the appellant, who took them, knowing the purposes for which they had been remitted, it was held, that he could not apply the proceeds in payment of a debt from Oswald, Seal & Co. to himself, but was liable for the price of the bills to the respondents,

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- (a) 1 Wils. 328; S. C. Sayer, 40. (b) 4 M. & Sel. 259.
 (c) 1 Bing. N. C. 414. (d) 8 Moo. P. C. 319.

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the owners of them. This was an overdue bill, the property in which could not pass by delivery. [Pollock, C. B.—Barton was a person holding the bill with a title to get the money on it. It was an overdue bill, of which the party really entitled to it allowed the drawer to have possession with all the indicia of property.] At all events, the plaintiffs are entitled to the money which has been received by the defendant. [Martin, B.—The defendant has paid over the money, or what amounts to the same thing, has allowed it in account.] The defendant converted the bill to his own use, by taking a note which could not be handed over to the plaintiffs, being not for the amount of the composition upon this bill separately, but for this bill, together with others.

POLLOCK, C. B.—The rule must be discharged. I am of opinion that the view taken by the learned Judge was correct. All that was done by the defendant was done by him in a ministerial capacity. I cannot treat an overdue bill of exchange in the hands of the drawer, he being a party to it and the apparent owner, like a horse or a chattel in the hands of one who is not the owner. An overdue bill drawn by A. on B. in the hands of a stranger is a different matter. Here the bill was returned by the plaintiffs, the indorsees, to Barton, the drawer, with all the names except those of Barton and the acceptor struck out. What the defendant did, was done by Barton's authority, and as his servant. The defendant was not aware, and had no means of knowing, that Barton was not the real owner of the bill. He advanced money on it, and he was justified in doing so, because the bill was in the hands of the drawer, who had an apparent right to it. He stopped a portion of the money received, to repay the advance which had been made by him. What he did in getting payment for the bill was merely done

by him as Barton's agent, and cannot be treated as the act of a wrong doer.

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MARTIN, B.—It would be very unjust to make the defendant liable in this action. But if there was any rule of law which rendered him liable, we should be bound by it. The facts were these: the plaintiffs, the owners of the bill, who were entitled to receive a dividend upon it, employed Barton, who was the drawer of the bill, to get the dividend for them. He delivered the bill to Barton with the indorsements on it struck out. Barton being in possession of the bill, employed the defendant, as his attorney, to get the dividend upon it. Barton subsequently obtained an advance upon it from the defendant. He had no right to pledge the bill; and at that time the plaintiffs might have maintained trover against the defendant if they had demanded the bill, and the defendant had refused to deliver it up. At the same time, if Barton had paid the money he might have had back the bill. The defendant, being in possession of the bill, got the dividend, and obtained, in satisfaction of the composition to be given in notes, a note not for the amount of the composition on this bill alone, but on this and other bills held by Barton, which he presented at the same time. Assuming that Barton had obtained a promissory note for the composition on the whole of the bills belonging to him, *he* would not have been liable in trover, but only to an action for not taking a smaller note. The detention of the £200 is exactly the same thing as if the whole money had been paid over by the defendant to Barton, and Barton had repaid the £200 to the defendant. The defendant did precisely what Barton might have done. I think that the verdict is right, and that the rule must be discharged.

Rule discharged.

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ALEXANDER v. DOWIE and Another.

The plaintiff, the owner of a ship, entered into a charter-party with the defendants, containing stipulations as to demurrage. The ship was detained in South America beyond the time stipulated for. The captain was in possession of the ship: he was to be paid freight and demurrage by bill in South America.

After the making of the charter-party, and before the settlement hereafter mentioned, the ship with the charter was sold to F. The captain became a part-owner of the ship. The captain having settled the account for freight, demurrage and delay with the defendant, by taking a bill in South America.

Held, that F. and the plaintiff, in whose name he was suing, were bound by such settlement.

Sensible, per Pollock, C. B. and Martin, B., that as captain he must have had authority to make such a settlement.

THE declaration stated, that by a charter-party made between the plaintiff and the defendants, it was agreed that the good ship, called the "Ambassadress," should with all convenient speed, proceed to Cardiff, and there in turn receive a cargo of coals, and being so loaded, should, with all convenient speed, sail and proceed to San Juan del Sur, and there receive orders from the defendant's agents, and discharge at that port, or at the Bay of Salinas Realejo, or Acapulco, or as near thereto as she could safely get; the coals to be discharged at the port of delivery and received by the agents of the defendants at the average rate of not less than 25 tons 4 cwt. per working day, to commence from the time of the said vessel being ready to unload, and in turn to deliver alongside steamer, craft, floating dépôt, or pier or wharf, if any, where the vessel could be afloat: that the defendants should load the cargo and pay freight, three-fourths by the acceptance of the defendants, at four months, &c., and the remainder on delivery, in United States currency, at the rate of 4 dollars 80 cents per pound sterling, or by approved bill at 30 days sight, at New York, at the captain's option: twenty-five working days to be allowed for demurrage over and above the time for discharge, to be paid at the rate of 9*l.* sterling per day daily, as the same should become due. Breach.—That the defendants did not unload the cargo within the time in the charter-party mentioned, but detained the ship beyond the working days allowed, to wit,

150 days: alleging special damage.—Plea (*inter alia*,) that defendants, by their agents, delivered a bill in satisfaction.

At the trial, before *Willes*, J., at the last Liverpool assizes, it appeared that the defendants were the agents in this country for the Vanderbilt line of steam ships. After the making of the charter-party, the plaintiff sold the "Ambassadress," and his interest in the charter-party to Fernie, Brothers, and others, on whose behalf the action was brought. Pentreath, the captain, was a part owner of the ship, but it did not appear what his interest was, if any, in the charter-party. The ship arrived at Salinas on the 2nd of January, 1853, when the captain gave notice to the charterers that he was ready to deliver the cargo. The only persons who carried on business at Salinas were the charterers; there was no port, town, or station there. In the bay there were two hulks, the San Francis de Paul, of 650 tons, and the Santiago, of 700 tons. Alongside the San Francis de Paul was a vessel, the Damascus, of 900 tons, discharging. The Santiago was half full; and the Dumbarton, of 500 tons, which arrived before the Ambassadress, was moored alongside the Santiago to be discharged into the Santiago. On the 15th of January the Ambassadress discharged a part of her cargo of coals into a steam ship, the "Brother Jonathan," but the whole of the cargo was not discharged until the 14th of June.

The defendants' agent contended that, by the terms of the charter-party, the payment was not to commence before the 15th of January, when the Ambassadress began to deliver on board the Brother Jonathan. Captain Pentreath claimed for demurrage from the arrival of the vessel on the 2nd of January. On the 26th of April, Body, White & Co., defendants' agents, at Salinas, signed the following memorandum:—"We will pay demurrage on the cargo, per Ambassadress, reckoning her lay-days, from the 15th

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of January, when bulk was broken; and we will likewise pay the freight, when ascertained. With respect to the disputed lay-days, from the 2nd of January to the 15th, we will arrange the matter so that it shall be settled between the charterers at Liverpool and the owner of the ship."

Captain Pentreath then made out the following debit note of what he was to receive.

"The agent of the Vanderbilt line of steamers.

To Edwin Pentreath, master of ship Ambassadress.

To 58 days' demurrage due said ship, at 9*l.* sterling per day . . . . . 522*l.*"

On the 25th of May there was a further claim, at 9*l.* per day, which was settled. On the 20th of June Captain Pentreath made out the following account.

"Messrs. Body, White & Co., agents of the Vanderbilt line of steamers,

To Edwin Pentreath, master of the ship Ambassadress.

To balance of freight as per charter-party, &c.

£741. 2*s.* 6*d.* \$4. 80. \$3557. 40.

To demurrage, from 2nd of January to 14th of June, working days, at 9*l.* per day, \$4. 80. \$4147. 20."

Captain Pentreath wrote at the foot of the account, "Settled by bill on C. Vanderbilt, Esq., of New York, 30 days sight, this 20th of June, 1853, E. P."

The account was settled by a bill drawn by Body, White & Co. on C. Vanderbilt. The learned Judge left it to the jury to say whether, considering Captain Pentreath's position as master and part owner, they thought that the settlement was final, and said that, no doubt, they would find that the captain had authority to settle. The jury found a verdict for the defendants.

*Edward James*, in Easter Term, had obtained a rule calling on the defendants to shew cause why the verdict should not

be set aside, and a new trial had, on the ground that there was no evidence of the captain being authorized to effect any settlement on behalf of the plaintiffs, and that he had no such authority in law.

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*Forsyth* and *Mellish* now shewed cause.—The action, though brought in the name of Alexander, because he was owner at the time of the charter-party and the party with whom it was made, is really brought by Fernie, Brothers, and the other parties interested in the ship. Captain Pentreath is one of these owners. Satisfaction to one of two part owners is an extinguishment of the right of both.

—The Court then called on

*Edward James* and *Quain*, to support the rule.—Alexander, the plaintiff, entered into this charter. Fernie, Brothers, bought the vessel and his interest in the charter-party. There is nothing to shew that Pentreath was a joint owner of the charter-party. It was for the defendant to prove that. [Pollock, C. B.—The presumption is, that he was owner to all intents and purposes.] In *May v. Taylor* (a) it was held that, where a party desires to use the admissions of the cestui que trust as evidence against the trustee, the interest of the cestui que trust must be clearly proved. [Pollock, C. B.—If Captain Pentreath was shewn by the defendant to be an owner, it was for the plaintiff to shew that his interest was less than that of an ordinary part owner.] In *Brodie v. Howard* (b) it was held that a part owner of a ship has no general authority to bind his co-owners for repairs. [Martin, B.—Alexander is a mere name; he represents the parties interested; Pentreath was interested; it is said that he was not interested in the

(a) 6 M. & G. 261.

(b) 17 C. B. 109.

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charter-party, but he was interested in the profits of the ship, and the profits were to arise from the charter-party. If two persons are partners, the presumption is that they are partners upon equal terms. Whatever right one has the presumption is that the other has the same.] Accord with satisfaction to Pentreath, is not accord and satisfaction with a joint owner. It is not the same as if Fernie, Brothers and Pentreath were necessary parties to the record. In that case one joint owner could not enforce his right by action without making the other a party (a). These parties are part owners, not partners; one cannot bind another, neither can an admission by one bind the other.

POLLOCK, C. B.—I am of opinion, that this rule ought to be discharged. I do not rest my decision in this case on the ground that the captain, as such, had authority to make a final settlement; but I give it as my opinion that a captain must have authority to make such a settlement. Captain Pentreath was an owner: there is no evidence of any distinction between his rights and those of the other owners, and conducting this transaction on behalf of all the owners, he had authority to make a settlement on behalf of all.

MARTIN, B.—I am of the same opinion. Alexander entered into a charter-party with Dowie and Forbes, containing stipulations as to lay days and demurrage. The ship was detained in South America beyond the time stipulated, and the plaintiff was entitled to damages. The captain was in possession of the ship, and he was to be paid in South America. He was entitled to receive an unliqui-

(a) *Wallace v. Kelsall*, 7 M. & W. 264; *Jones v. Yates*, 9 B. & C. 532.

dated sum of money. I believe that the view taken by my brother *Willes* was, that of necessity the captain had authority to settle all such matters, and that business could not be carried on unless the captain's agreement under such circumstances was binding. I concur with him in thinking that a captain must necessarily have authority to make such settlements, otherwise persons having to make payments abroad would be placed under insuperable difficulties. Here, however, after the making of the charter-party, Fernie, Brothers, bought the vessel for several people. The captain proved that he was a part owner of the vessel. There is no direct proof of the fact, but doubtless he was in substance part owner of the contract. One of the evils of joint ownership is, that parties not present are bound by the acts of one joint owner. I never heard of the suggested limitation of the rule to the case of joint plaintiffs. The difficulty of suing is often referred to, by way of illustration, as one of the many inconveniences of joint ownership. But it is not the only one: one joint owner can release: accord and satisfaction with one destroys the debt: payment of the debt to one is a bar, not because the receiver must be a co-plaintiff, but because it is satisfaction,—a destruction of the debt. My brother *Bramwell* doubted only as to the authority of the captain.

Rule discharged (*a*).

(*a*) *Bramwell*, B. had left the Court before the conclusion of the argument.

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May 28.

A deed of arrangement, under the 224th section of "The Bankrupt Law Consolidation Act, 1849," which excepts from the assignment the wearing apparel of the debtor and his family, is void.

Sembler, that a deed of arrangement under that Act ought to provide for the distribution of the debtors estate amongst all his creditors, and not those only who execute the deed.

MARCH v. WARWICK.

DECLARATION for goods sold and delivered.

Plea: that before and at the time of the making of the indenture hereinafter mentioned, and for six calendar months and upwards next before the suspension of payment by the defendant as hereinafter mentioned, the defendant was a trader, to wit, a butcher and baker, liable to the bankrupt laws, and within the meaning of the statute hereinafter mentioned, and for such six calendar months carried on business at one and the same place, to wit, at Crowland, &c.; and that after the accrual of the causes of action in the declaration mentioned, and before and at the time of and after the making of the indenture hereinafter mentioned, the defendant was indebted to the plaintiff, and to divers persons in divers sums of money, which sums of money the defendant was then unable to pay in full: that after the passing and coming into operation of The Bankrupt Law Consolidation Act, 1849, to wit, on &c., the defendant suspended payment, and afterwards, to wit, on the 8th day of June, A.D. 1853, by a certain indenture then made between the defendant of the first part, John Bee, one Thomas Wyche and one James Warwick, being three of the principal creditors of the defendant, of the second part, and the several other persons parties thereto who, by themselves or their respective attorneys thereto, subscribed their respective names or firms, and affixed their seals (being also creditors of the defendant), of the third part; after reciting that the defendant was indebted to the said several parties thereto of the second and third parts said respectively in the several sums of money set opposite to their respective names or firms in the schedule thereunder

written, and that the defendant being unable to discharge the full amount of his said debts, had then lately called his creditors together, and at the meeting of such creditors it was agreed and determined that the defendant should assign and assure to the said J. Bee, T. Wyche and J. Warwick their executors &c., all his personal estate and effects whatsoever and wheresoever, upon and for the trusts and purposes, and with under and subject to the powers, agreements and declarations thereafter expressed concerning the same; the defendant in pursuance of the said agreement on the part of the defendant, and in consideration of the premises and of the covenants thereafter contained on the part of his said creditors, did bargain, sell, assign, and confirm unto T. Wyche and J. Warwick, their executors &c., all and singular the stock in trade, crops, goods, wares, merchandize, fixtures, utensils, implements, household goods and furniture, plate, china, linen, cattle, horses, carts and carriages, ready money, moneys in the public stocks or funds, book and other debts, and all bonds, bills, notes and other securities for money of or belonging or then due and owing to the defendant, or to which he was in any manner or way entitled, and all other the personal estate, monies and effects whatsoever and wheresoever to which he was in any manner or way entitled, either in possession, reversion, remainder or expectancy (*save and except the wearing apparel of himself and his family*), and the full benefit of all covenants, agreements, obligations and engagements at any time thereafter entered into or incurred by any person or persons to or with the defendant: and all the right, title, interest, property, possession, claim and demand at law and in equity of the defendant in and to the said premises: to have, hold, receive and take the said premises thereby assigned, or intended so to be, unto and by the said J. Bee, T. Wyche

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and J. Warwick, their executors, &c., as and for their absolute property, nevertheless upon and for the trusts and purposes hereinafter declared concerning the same." The indenture then proceeded to declare the trusts, which were, that the trustees should sell and dispose of, receive, collect, get in and compel payment of or otherwise convert into money the estate and effects thereby assigned, and should stand possessed of all monies which should come to their hands by virtue of that indenture; upon trust in the first place to pay the costs then incurred by the defendant in calling together his creditors, and the costs of the trustees relating to the execution of the trusts—" And after full payment and satisfaction of all such costs, charges, disbursements and expenses; upon trust that they the said trustees, or trustee for the time being, should and would divide and pay all the residue or surplus of the said monies which should remain after answering the trusts and purposes aforesaid, unto and among them the said J. Bee, T. Wyche and J. Warwick, and the several other creditors, parties thereto of the third part in full satisfaction and discharge of their respective debts set opposite to their respective names or forms in the said schedule thereunto, rateably and in proportion to the amount of such respective debts without any preference or priority whatsoever." Then followed a covenant by the trustees and the several persons parties thereto of the third part, that on receipt of the final dividends to be thereafter declared on the trust estate, they would release to the defendant their respective debts, and that, in the mean time, they would not commence any action or suit against the defendant, or sue out any arrest, attachment or other process against him or his estate or effects, by reason of any debt then owing from the defendant to them; and that, if they should offend in the premises, the said deed should operate as a release and might be pleaded as such.

—Averments: that before the commencement of this suit, and before the giving of the notice hereinafter mentioned to the plaintiff, to wit, on &c., the said indenture was signed and sealed, and delivered to the defendant, by the said J. Bee, T. Wyche and J. Warwick, so being creditors of the defendant as aforesaid, and divers, to wit, thirty other creditors of the defendant, signed the said indenture and subscribed their names and affixed their seals thereto: that at the time of the meeting of his creditors mentioned in the said indenture, and at the time of the making of the said indenture, and of his signing, sealing and delivering the same, he the defendant had no real estate whatsoever, and that the estate and effects conveyed and assigned by the said indenture were all the estate and effects of the defendant, *except the wearing apparel of himself, his wife and children, and that he then had no more wearing apparel than was necessary for himself, his wife and children:* that the said indenture, at the time of the making thereof, and at all times since, was, and yet is, a deed of arrangement between the defendant and his creditors within the meaning of the provisions of “The Bankrupt Law Consolidation Act, 1849,” and that the creditors by whom the same was signed and sealed as aforesaid (including the said J. Bee, T. Wyche and J. Warwick), were six-sevenths in number and value of the creditors of the defendant within the meaning of the provisions of the said Act, whose debts amounted within the meaning of the said provisions to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that at the time of the making of the said indenture the plaintiff was a creditor of the defendant in respect of the causes of action

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in the declaration mentioned; and the sum sought to be recovered in this action then was a debt due from the defendant to the plaintiff within the meaning of the said Act.—The plea then proceeded to state that after the indenture had been so executed by the majority of the creditors of the defendant, the plaintiff had notice of it: that three calendar months from the time of such notice had elapsed before the commencement of the suit: that the defendant had performed all things by the indenture required to be performed: that the trustees raised a large sum of money and declared a dividend amongst all the creditors of the defendant, as well those who had not signed as those who had signed the indenture, at the rate of 6*s.* 3*d.* in the pound, and they offered the plaintiff to pay him the amount of the dividend upon his debt, and are still ready to do so.

Replication, setting out the indenture verbatim.

Demurrer to replication and joinder therein.

Worlledge, in support of the demurrer.—The deed mentioned in the plea is a valid deed of arrangement under “The Bankrupt Law Consolidation Act, 1849” (12 & 13 Vict. c. 106). By the 224th section of that Act, every deed or memorandum of arrangement entered into between a trader and his creditors and signed by six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, shall be as obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same. [Martin, B.—Are not the cases of *Drew v. Collins* (a) and *Tetley v. Taylor* (b) precisely in point?] In those cases six-sevenths of the creditors executed a deed of arrangement by which they covenanted to release the

(a) 6 Exch. 671.

(b) 1 E. & B. 521.

debtor on receiving a certain composition; and it was held that the 224th section of the Bankrupt Law Consolidation Act does not render any deed of arrangement obligatory on those creditors who have not signed it, unless it provides for the distribution of the whole of the debtor's estate, as in bankruptcy. By this deed the creditors who sign it get everything which they would obtain under a fiat in bankruptcy. The only exception in the deed is the wearing apparel of the plaintiff and his family; and it was obviously the intention of the legislature that such articles should be excepted. The 109th section authorizes a messenger, acting under the warrant of the Court, "to seize any property of the bankrupt (his necessary wearing apparel only excepted.)" So by the 156th section, if any assignee indebted to the bankrupt's estate become bankrupt and obtain his certificate, it shall have the effect only of freeing his person from imprisonment, "but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children excepted) shall remain liable," &c. Again, the 251st section declares that a bankrupt shall be deemed guilty of felony who shall not deliver up to the Court such part of his estate "as shall be in his possession, custody and power (except the necessary wearing apparel of himself, his wife and children.)" In like manner the common law makes an exception as to wearing apparel. An innkeeper has a lien on the goods of his guest, but he cannot take off his clothes; *Sunbold v. Alford* (a). [Martin, B.—*Cooper v. Thornton* (b) decided that a deed of this description is not valid, though it conveys the debtor's whole estate to trustees, if it empower them to give back to the debtor effects to the value of 20*l.*] The object of the legislature was to effect a distribution of the debtor's estate without the expense of a

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(a) 3 M. & W. 248.

(b) 1 E. & B. 544.

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stat in bankruptcy, and that is provided for by this deed. But further it will be objected that the deed is invalid, because it provides for the distribution of the assets among those creditors only who sign the deed, and not amongst the creditors generally. That objection is founded on the dictum of *Parke*, B., in *Larpent v. Bibby* (*a*), who says, "We have some doubt whether the deed is not void as making the estate distributable amongst, not all the creditors, but those only who execute the deed. We should have clearly thought so, except that such a deed is in practice common, and in all cases of a conveyance for the benefit of creditors, it is for the distribution of the estate amongst the creditors, parties to the deed. But if we cannot take notice of that, as we probably ought not to do, the deed is void on this account also." But the 224th section expressly declares that such deed of arrangement shall be as effectual and obligatory in all respects upon all creditors, who shall not have signed it, as if they had signed it. As soon as six-sevenths of the creditors have signed the deed, the statute attaches, and renders it binding on all the creditors. In *Fisher v. Bell* (*b*) the assignment was, as here, in trust for the creditors who were parties to the deed.

Quain, contrà, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the plea is bad.

MARTIN, B., and BRAMWELL, B., concurred.

Judgment for the plaintiff.

(*a*) 5 H. L. Cas. 481.

(*b*) 12 C. B. 363.

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AGGS v. NICHOLSON, and Another.

June 10.

DECLARATION on a promissory note made by the defendants, for payment to one May, or order, of 67*l.* 15*s.* 6*d.*, three months after date, and by May indorsed to the plaintiff.

Plea.—That the alleged promissory note was, at the time of the making and delivering and indorsement of the same, and is, an instrument sealed with the common seal of the incorporated company hereinafter mentioned, and was and is in the words and figures following:—"67*l.* 15*s.* 6*d.*—London, Oct. 22nd, 1855. Three months after date we, two of the directors of the Ark Life Assurance Society, by and on behalf of the said society, do hereby promise to pay to Mr. Charles H. May, or order, the sum of sixty-seven pounds fifteen shillings and sixpence, value received. Chas. Nicholson. H. Wood." And the defendants say, that the said company was, at the time of the making of the alleged promissory note, a company incorporated, and duly and completely registered under an act of parliament, passed in a session of parliament holden in the seventh and eighth years of the reign of her present Majesty, for the registration and incorporation of joint stock companies; and that the defendants made and signed the alleged note as, and being in fact, two of the directors and on behalf of the said company, and not with the view or intention of binding themselves, or either of them, personally to pay the said note; and that directors of the said society were duly authorized, as mentioned in the statute, to make and issue the alleged promissory note for and on behalf of the said

The following instrument was signed by two directors of a completely registered Joint Stock Company, and sealed with the seal of the Company.—"Three months after date we, two of the directors of The Ark Life Assurance Society, by and on behalf of the said Society, do hereby promise to pay to M. or order the sum of 67*l.* 15*s.* 6*d.*," value received. There was no counter signature by the secretary of the Company.

Held, a promissory note binding on the Company, and not the parties who signed it.

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company; and that the alleged note was so made and given, for or in respect of a debt and sum of money due and owing by and from the said company as such company as aforesaid, and not otherwise; and that save as aforesaid, the defendants did not make or deliver the alleged promissory note: of all which premises the payee of the alleged note and the plaintiff respectively, at the time of the alleged making and indorsement thereof, had notice.

Demurrer and joinder therein.

Lush argued in support of the demurrer (May 28.)—The plea is bad, since the promissory note is not in conformity with the provisions of the 7 & 8 Vict. c. 110, s. 45 (a).

(a) “And be it enacted, with regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such Company, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such Company thereon, That if the directors of the Company be authorized by deed of settlement or bye law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the Company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such Company; and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the Company in whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received by or on behalf of the Company, may be indorsed in the name of the Company by any officer authorized by deed of settlement or bye law in that behalf; and that every such bill of exchange or promissory note so made, accepted, or indorsed as aforesaid shall, immediately after the making, accepting or indorsing of the same, be reported to the proper officer of the Company on whose behalf the same shall have been made, accepted or indorsed; and such last mentioned officer shall enter the same in proper books to be kept for that purpose; and that if such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered shall be liable to repay to the

That statute does not authorize the company to make a promissory note under seal, and it requires that every promissory note made on behalf of the company shall be countersigned by the secretary or other appointed officer. Then, treating this as a promissory note under the 3 & 4 Anne, c. 9, the defendants are personally liable. It contains a promise by the defendants to pay the amount on behalf of the society. [*Pollock, C.B.*—There is a difference between promising to pay on behalf of another; and on behalf of another promising that payment shall be made.] There is nothing on the face of the note to indicate a disclaimer of personal liability. In *Mare v. Charles* (*a*), a bill of exchange, purporting to be for "value received in machinery supplied the adventurers in H. & M. mines," was drawn on the defendant individually. The defendant wrote across the bills "accepted for the company, M. C., purser." The defendant was purser of the mines, but was not a shareholder; and it was held that he was liable as acceptor of the bills. *Thomas v. Bishop* (*b*) is a distinct authority that a bill drawn on the cashier of a company and accepted by him generally, binds him as an individual, notwithstanding there is a direction in the bill to place the amount to the account of the company. [*Bramwell, B.*—In *Bradlee v. Boston Glass Manufactory* (*c*) the action was on the following note—

Company the amount which the Company shall pay or be liable to pay in respect of such bill or note: Provided always, that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon except as shareholders of the Company; and that every such Company on whose

behalf or account any bill of exchange or promissory note shall be made, accepted, or indorsed in manner and form aforesaid, shall and may sue and be sued thereon as fully and effectually, and in the same manner as in case of any contract made and entered into under their common seal."

(*a*) 5 E. & B. 978.

(*b*) 2 Str. 955.

(*c*) 16 Pickering, Amer. Rep. 347.

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"For value received we the subscribers jointly and severally promise to pay Messrs. B. or order for the Boston Glass Manufactory \$3500 on demand, with interest." This note was signed by three persons, without annexing to their names any words designating a connection with the corporation, but it was entered in the note book of the corporation as a note due from them, and the interest thereon was annually paid by them. The Court considered that the words "jointly and severally" fixed the undertaking as a personal one; and that if the words "for the Boston Glass Manufactory" had stood alone, the note would have bound the company. Here the words are "*we, on behalf of the society, do hereby promise to pay,*" &c.] Unless this is the note of the defendants, it is void, and therefore the Court will construe it according to the well-known principle "*ut res magis valeat quam pereat.*"

*Raymond, contrà.*—First, the company are liable on this promissory note. It does in substance comply with the requisites of the 7 & 8 Vict. c. 110, s. 45. It is "made by and in the names of two of the directors of the company;" and it is "by such directors expressed to be made on behalf of the company." The provision that every such note shall be countersigned by the secretary is merely directory: it must exist as a note before it can be submitted to the secretary for his counter-signature. The statute does not say that "every such note so made and countersigned" shall be reported to the proper officer, and entered in a book. The words "promissory note" are used in the sense of the ordinary promissory note. In *Allen v. The Sea Fire and Life Assurance Company* (a), an instrument signed by two directors of a joint stock company completely registered was in the following form:—"Sea,

(a) 9 C. B. 574.

Fire, and Life Assurance Society. To the cashier—Ninety days after date, credit Mrs. Anne Allen or order with the sum of 311*L. 9s. 6d.* claims per Susan King, in cash, on account of this corporation;”—and that was held to be a promissory note and binding on the company, notwithstanding it might not have been drawn strictly pursuant to the provisions of the deed of settlement, so as to be binding on the shareholders. Suppose a promissory note was countersigned by a person who was not properly appointed as secretary, would not the note be valid? The public cannot tell whether the person who purports to countersign the note as secretary is in fact secretary. [Pollock, C.B.—Or suppose the secretary was dead, and no other was appointed.] Those considerations shew that that provision is merely for the benefit of the company.—Secondly, this instrument binds the company as a deed. The 46th section of the 7 & 8 Vict. c. 110 enacts, “That all deeds and instruments bearing the seal of the company shall be signed by two at the least of the directors of the company.” This instrument bears the seal of the company and is signed by two directors. There is nothing to prevent it from operating as a valid contract under seal to pay a sum of money. Delivery is not necessary in the case of a corporation, for the fixing their common seal to the deed is tantamount to a delivery. Com. Dig. tit. “Fait” (A. 3). But assuming that this is not a promissory note binding on the company, it does not follow that it binds the directors who signed it. It is apparent on the face of it that it was intended to bind the company, and to construe it as binding some one else would be to make a new contract contrary to the apparent intention of the parties.—He also referred to *Rex v. Newland* (*a*).

*Lush*, in reply.—Bills of exchange and promissory notes  
(*a*) 1 Leach, C. C. 311.

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are the creature of the law merchant, and cannot be made under seal. A cause of action is not assignable by deed poll, so as to give the assignor a right to sue upon it in his own name. [Pollock, C. B., referred to *Slark v. The Highgate Archway Company* (a).]

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—We are of opinion the judgment should be for the defendants. Considering the note independently of the statute referred to, looking only to the meaning of the words used, we think they purport to bind the company, and not the parties signing. Nobody doubts that that was the real intention, and why the law should regard popular language otherwise than popularly it is difficult to see, in this case at least. “We, two of the directors of the Ark Society, on behalf of the society, promise to pay:” sealed with the seal of the society. Had the words been, “We, the society promise;” signed, “P. N.—H. W., for the society,” or on “behalf of the society,” it would have been clear. But we know well that the usage has been to say: “I promise for A. B.” instead of saying, “I, A. B. promise; signed for A. B., C. D.,” and the words “on behalf” clearly originate in the 7 & 8 Vict. c. 110.

But it is said that this construction makes the note void, because the requisites of the 7 & 8 Vict. c. 110 have not been complied with. But we think Mr. Raymond shewed that section 45, directing the signature of the secretary, was only directory, and consequently that the note is good against the company. But we are of opinion that, even if void against the company, the note is not therefore to be

(a) 5 Taunt. 792.

held good against the defendants. There is no estoppel: the effect of the plea is, that the defendants did not deliver this note to the plaintiff, except as acting for the company. Then if the note is imperfect, that is no more the fault of the defendants than of the plaintiffs; it is not to be construed for the one and against the other, but must receive its proper construction, which we think is not that for which the plaintiff contends.

Judgment for the defendants.

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## HOUGH v. EDWARDS.

June 11.

**I**N this case, the now defendant had recovered judgment, with 50*l.* damages, in an action brought by him against one Hodges. One Jay was the attorney for the defendant in that action, and the defendant was indebted to him in a balance for costs. The now plaintiff afterwards brought this action against the defendant and recovered judgment for 19*l* 11*s.* He then proceeded, under the garnishee clauses of the Common Law Procedure Act, 1844, to attach the debt due to the now defendant on his judgment against Hodges. The defendant's attorney thereupon paid the amount into Court. Jay then took out a summons, calling on the now plaintiff to shew cause why the said sum of 19*l* 11*s.* should not be paid out of Court to him, on the ground that he had a lien on the judgment obtained by the now defendant against Hodges. The summons was heard before *Platt, B.*, who made an order accordingly. In Easter Term, 1855, a rule was obtained calling on Jay to shew cause why the order of *Platt, B.*, should not be rescinded and the money paid back into Court.

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After argument, it was ordered that the rule be enlarged, and that in the mean time it be referred to the Master to ascertain, first, whether there was any particular lien in the cause of *Edwards v. Hough*, for extra costs; secondly, whether there was any special agreement between Jay and the now defendant that Jay should retain the damages recovered by the now defendant in his action against Hough, against Jay's bill of costs. The Master found both questions in the negative, and he certified that it was conceded before him that Jay's general bill against the now defendant was more than sufficient to cover the amount of the plaintiff's judgment against the defendant.

*Atherton (V. Harcourt with him)* now shewed cause against the rule to rescind the order of *Platt*, B.—The question is, whether the general lien of an attorney against his client in respect of costs prevails over the claim of a judgment creditor under the garnishee clauses of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 61, 62, &c.) It is submitted that it does. If a person has a lien on a chattel, and execution issues against the owner, the sheriff can only sell the chattel subject to the lien. The same principle applies here. [*Martin*, B.—What possession has the attorney of a judgment? If the client employed another attorney to issue execution, would the first attorney have a lien on the proceeds?] In *Montagu on Lien*, p. 53, it is said “An attorney has a general lien against his client for his costs on all the papers with which he is intrusted by his client, and upon money, or upon a judgment recovered for him.” *Giles v. Nathan* (a) is an express authority that the plaintiff, in a foreign attachment, cannot take money or goods out of the hand of a garnishee who has a lien thereon, without discharging the lien.—He

(a) 5 Taunt. 558.

also referred to *Kennett v. The Westminster Improvement Commissioners* (*a*).

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*Quain*, in support of the rule.—The general lien of an attorney for costs cannot defeat an attachment by a judgment creditor under the Common Law Procedure Act, 1854. In *Barker v. St. Quintin* (*b*), *Parke*, B., said, “The *lien* which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression), is merely a claim to the equitable interference of the Court, to have that judgment held as a security for his debt.” The nature of a solicitor’s lien for costs is explained by Lord *Cottenham*, C., in *Bozon v. Bolland* (*c*).—He was then stopped by the Court.

**POLLOCK**, C. B.—We have no doubt about the matter. The passage cited from the case of *Barker v. St. Quintin*, is conclusive on the subject, and the rule will therefore be absolute.

**ALDERSON**, B., concurred.

**MARTIN**, B.—It is perfectly true, as observed by *Parke*, B., that an attorney has no such general lien as is suggested; for a lien exists by reason of possession, and an attorney has no possession of a judgment. The right of the attorney is merely this,—that if he gets the fruits of the judgment into his hands, the Court will not deprive him of them until his costs are paid.

**ALDERSON**, B., added.—One party might pay the other without the interference of the attorney.

Rule absolute.

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| ( <i>a</i> ) 11 Exch. 349. | ( <i>b</i> ) 12 M. & W. 441. |
| (c) 4 Myl. & C. 354.       |                              |

1856.

*June 6.*      **GULLIVER v. WILLIAM GULLIVER and Others, Executors of THOMAS GULLIVER, deceased.**

Declaration against executors, for goods sold, work done and money lent by the plaintiff to their testator.  
 Pleas.—First, the Statute of Limitations. Secondly, a set-off of money due from the plaintiff to the testator for the use and occupation of premises, money lent, money paid, &c.—  
 Replication on equitable grounds to first plea: that the testator bequeathed his real and personal estate to the defendants upon trust, to pay his funeral and testamentary expenses, and debts and legacies, to hold the residue in trust for the plaintiff and his other children in equal shares.—  
 Replication on equitable grounds to second plea: that the testator bequeathed to the plaintiff and his other children certain sums of money, and declared by his will that the monies and other effects then already advanced and delivered by him to his children were, and should be deemed, advancements; and that they should not be required to account for the same. Averment,—That the alleged causes of set-off were money and effects then already advanced and delivered by the testator to the plaintiff.

*Held*, on demurrer, that the replications were bad.

**D**ECLARATION for money payable by the defendants, as executors, for goods sold and delivered, work done, money lent, &c., by the plaintiff, to and for the testator in his lifetime.

Pleas.—First, the Statute of Limitations: secondly, a set-off of money due from the plaintiff to the testator, for the use and occupation of certain premises, money lent, money paid, &c.

Replication on equitable grounds to first plea.—That the causes of action accrued within six years before the death of the said T. Gulliver: that T. Gulliver duly made and published his last will and testament, and thereby appointed the defendants executors thereof, and (amongst other things) devised and bequeathed certain freehold messuages, farms, lands, &c. unto the defendants, upon trust that they should sell the same: and T. Gulliver thereby also bequeathed the residue of his personal estate unto the defendants, upon trust that they should call in and convert into money such part of his said personal estate as should not consist of money; and that the defendants should, by and out of the monies to arise by the sale of the said real estate, and from the sale, calling in, and conversion of such part of his said personal estate as should not consist of money, of which he should be possessed at the time of his death, pay his funeral and testa-

mentary expenses, and debts and legacies, to hold the residue in trust for the plaintiff and his other children in equal shares. Averment,—That the alleged causes of set-off were money and effects then already advanced and delivered by the testator to the plaintiff.

mentary expenses and debts and legacies bequeathed by his said will or any codicil thereto, and should hold the residue of the said monies in trust for the plaintiff and his other children, in equal shares.—Averment: that the monies realized and to be realized as aforesaid, are and will be sufficient to pay all the funeral and testamentary expenses, and debts and legacies.

Replication on equitable grounds to second plea.—That the said T. Gulliver, by his said will (amongst other things) devised and bequeathed to the plaintiff, his heirs and assigns, the testator's messuage, &c., situate at Chipping Norton; and the testator by his will also gave and bequeathed the sum of 2,490*l.* to the plaintiff absolutely; and the sum of 1,600*l.* to the defendant, W. Gulliver, absolutely, &c. (The plea then proceeded to state other gifts to other children of the testator.) And the testator by his will declared that the monies and other effects then already advanced and delivered by him to his several children, were and should be deemed to be advancements, and that they respectively should not be required to account for the same.—Averments: that the alleged causes and matters of set-off and every part thereof, were and are, and was and is, money and effects so then and already advanced and delivered by the testator to the plaintiff as aforesaid, as in the said will mentioned, and not otherwise: wherefore the defendant ought not to be allowed to set off the same, or any part thereof, in this action.

Demurser to each replication and joinder therein.

*Phipson* (*J. Brown* with him), in support of the demurrsers.—First, as to the replication to the plea of the Statute of Limitations. That replication is founded on a rule which prevails in Courts of equity, that where a trust or charge is created by will for payment of debts, it operates in equity

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Declaration against executors, for goods sold, work done and money lent by the plaintiff to their testator.

Pleas.—First, the Statute of Limitations. Secondly, a set-off of money due from the plaintiff to the testator for the use and occupation of premises, money lent, money paid, &c.—Replication on equitable grounds to first plea: that the testator bequeathed his real and personal estate to the defendants upon trust, to pay his funeral and testamentary expenses, and debts and legacies, to hold the residue in trust for the plaintiff and his other children in equal shares.—Replication on equitable grounds to second plea: that the testator bequeathed to the plaintiff and his other children certain sums of money, and declared by his will that the monies and other effects then already advanced and delivered by him to his children were, and should be deemed, advancements; and that they should not be required to account for the same. Averment.—That the alleged causes of set-off were money and effects then already advanced and delivered by the testator to the plaintiff.

*Held*, on demurrer, that the replications were bad.

**DECLARATION** for money payable by the defendants, as executors, for goods sold and delivered, work done, money lent, &c., by the plaintiff, to and for the testator in his lifetime.

Pleas.—First, the Statute of Limitations: secondly, a set-off of money due from the plaintiff to the testator, for the use and occupation of certain premises, money lent, money paid, &c.

Replication on equitable grounds to first plea.—That the causes of action accrued within six years before the death of the said T. Gulliver: that T. Gulliver duly made and published his last will and testament, and thereby appointed the defendants executors thereof, and (amongst other things) devised and bequeathed certain freehold messuages, farms, lands, &c. unto the defendants, upon trust that they should sell the same: and T. Gulliver thereby also bequeathed the residue of his personal estate unto the defendants, upon trust that they should call in and convert into money such part of his said personal estate as should not consist of money; and that the defendants should, by and out of the monies to arise by the sale of the said real estate, and from the sale, calling in, and conversion of such part of his said personal estate as should not consist of money, of which he should be possessed at the time of his death, pay his funeral and testa-

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Demurrer to each replication and joinder therein.

*Phipson* (*J. Brown* with him), in support of the demurrs.—First, as to the replication to the plea of the Statute of Limitations. That replication is founded on a rule which prevails in Courts of equity, that where a trust or charge is created by will for payment of debts, it operates in equity

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to prevent the Statute of Limitations from being set up (*a*). But the rule has no application to an action at law. The 85th section of the Common Law Procedure Act, 1854, which allows equitable replications, does not authorize a party to prosecute an equitable claim in a Court of law. An equitable replication ought to support the right to sue in a Court of law, but this replication only shews, that the plaintiff has a remedy in a Court of equity, notwithstanding the Statute of Limitations. Suppose a cestui que trust sued his trustee in a Court of law, and the latter pleaded that he was trustee, and was sued by his cestui que trust in respect of the trust property, could the plaintiff reply, by way of equitable replication, facts shewing his right to recover in a Court of equity? [Pollock, C. B.—The 21 Jac. I, c. 16, applies in terms to actions at law only, though by analogy Courts of Equity have adopted the provision; but the 85th section of the Common Law Procedure Act, 1854, cannot alter the effect of the Statute of Limitations in Courts of law.] A Court of equity controls the equitable assets, but does not disturb the legal priority; therefore, if in this case the plaintiff obtained a judgment, it would interfere with the equitable distribution of the assets.

Secondly, the replication to the plea of set-off is also bad. A conclusive objection is, that a debt arising from the use and occupation of premises is not, within the terms of the will, money and effects advanced and delivered. Besides, the replication ought to have shewn, that the executors assented to the bequest, and that there were, without the monies and effects advanced, sufficient assets to pay all the testator's debts: 2 Wms. Exors. 1176, 4th ed. The meaning of the clause in the will is, that the plaintiff shall not be required to pay any balance which may be found due from him to the testator on

(*a*) See *Burke v. Jones*, 1 Ves. & B. 275.

accounts subsisting between them at the time of the testator's death; and it was never intended that the debt due from the testator to the plaintiff should be sued for, and the plaintiff's debt to him relinquished. [*Pollock, C. B.*—An equitable pleading cannot be allowed, unless its effect is to put an end to the dispute between the parties.]

*Gray, contra.*—First, the replication to the Statute of Limitations is a good equitable replication, within the meaning of the 85th section of the Common Law Procedure Act, 1854. The devise of the testator's real and personal estate for payment of his debts created a trust for the benefit of creditors. It appears by the replication, that there were sufficient assets to pay the testator's debts. The fact of the defendant being trustee does not render it necessary that the plaintiff should resort to a Court of equity, but he may reply this matter by way of equitable answer to the plea.

Secondly, the replication to the plea of set-off is good. It shews that the debt, sought to be set off, has in equity been condoned and extinguished, so as no longer to constitute the subject-matter of a suit or a set-off. The plea admits assets. If the set-off is allowed to prevail, the portions of the children in the residue of the testator's estate will be unequal. The circumstance, that part of the plaintiff's claim is for use and occupation, is immaterial. The assent of the executors is unnecessary where assets are admitted.

Per *CURIAM* (*a*).—There must be judgment for the defendants on the demurrers to both replications.

Judgment for the defendants.

(*a*) *Pollock, C. B., Martin, B., and Bramwell, B.*

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## ANN DE WAHL v. BRAUNE.

A feme covert  
cannot sue  
alone on a  
contract made  
with her before  
or after mar-  
riage though  
her husband is  
an alien enemy.

**D**ECLARATION on an agreement in writing between the plaintiff and defendant, whereby, after reciting that the plaintiff had for some years carried on a school for the education of young ladies, at No. 43, Abbey Road, and was entitled to the benefit of a lease of the said house, the plaintiff agreed to sell, and the defendant to buy, all the interest of the plaintiff in the matters aforesaid for 500*l.*.—Averment of performance of conditions precedent.—Breach: nonpayment of part of the purchase money.

Plea in abatement.—That the plaintiff, before and at the commencement of this suit, was and still is married to one De Wahl, then and yet her husband, and who is still living. And this the defendant is ready to verify: wherefore, because the said De Wahl is not named in the said writ and declaration, the defendant prays judgment of the same, and that they may be quashed.

Replication.—That before and at the time of the commencement of this suit, the said De Wahl in the plea mentioned was and still is an alien born of foreign parents and in parts beyond the seas, to wit, in the empire of Russia, and did not at the time of the commencement of this suit reside, nor was he then present in this country, nor was he ever a subject of this country by naturalization, denization, or otherwise; that the cause of action in the declaration mentioned accrued to the plaintiff within the realm of England, to wit, in the county of Middlesex, whilst she, the plaintiff, was a subject of our Lady the Queen, and residing in this country as a single woman, separate and apart from the said De Wahl in the plea mentioned, and

that the defendant became liable to her as in the declaration mentioned as a single woman, and not otherwise: that before and at the time of the commencement of this suit, the sovereign and subjects of the said empire of Russia were and still are at war with and enemies of our said Lady the Queen, and that the said De Wahl in the plea mentioned was and still is resident within the said empire of Russia, and adhering to the said enemies of our said Lady the Queen.

Demurrer and joinder.

*Lush*, in support of the demurrer.—The replication affords no answer to the plea. As a general rule, a married woman cannot sue alone. The only exception is where her husband is *civiliter mortuus*, as in the case of transportation. If the replication had not alleged that the husband was an alien enemy, the case would have been free from all doubt; but the fact of the husband being an alien enemy does not entitle the wife to sue alone. It would be a violation of the established rules of law to allow her to sue for the benefit of an alien enemy.—The Court then called on

*Ogle*, to support the replication.—Upon these pleadings, it may be assumed, that the contract was entered into before marriage. There is nothing which militates against that view, except that the plaintiff and her husband are of the same name. Assuming, then, that this was a contract before marriage, the wife is the meritorious cause of action, and might have joined with her husband. Where a married woman, who might have joined, sues alone, the objection can only be pleaded in abatement, and not in bar; and if the defendant omits to plead the nonjoinder, the wife, if she succeeds at the trial, will be entitled to judgment, subject to the right of the husband to bring a writ

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of error: *Milner v. Milnes* (*a*); 1 Chit. Plead. p. 37, 7th ed. It is clear, therefore, that the coverture does not affect the cause of action. Then this replication shews that the plaintiff's husband is an alien enemy, and therefore civiliter mortuus. In Walford on Parties to Actions, p. 1015, it is said, that if a woman marry an alien enemy who is prevented by law from suing in the Courts of the country, the wife is to be regarded as in a state of widowhood. Again, in Roper on Husband and Wife, vol. 2, p. 122, it is said, "But when the husband is prevented from coming here, as in the instance of his being an alien enemy, then the principle of the exception applies." In Kent's Com. vol. 2, p. 155, the learned author observes, that "Lord Coke seems to put the capacity of the wife to sue as a feme sole upon the ground that the abjuration or banishment of the husband amounted to a civil death. But if the husband be banished for a limited time only, though it be no civil death, the better opinion is, that the consequences as to the wife are the same, and she can sue and be sued as a feme sole. And if the husband be an alien always living abroad, the reason of the exception also applies." Unless the wife could sue, the claim might be barred by the Statute of Limitations. [Pollock, C. B.—Choses in action belonging to an alien enemy are forfeited to the Crown; but to establish the title of the Crown there must be an inquisition: *Attorney General v. Weeden* (*b*). Martin, B.—The effect of the marriage is to vest in the husband all the interest in the contract; he might release it if he thought fit: *Garforth v. Bradley* (*c*).] Suppose a married woman, whose husband is an alien enemy, is slandered or assaulted, is she to be without remedy? But further, assuming that the contract was made with the wife during her coverture, the same

(a) 3 T. R. 627.

(b) Parker, 267.

(c) 2 Ver. Sen. 675.

principle will apply, since she is the meritorious cause of action.

Lush, in reply.—It is immaterial whether the contract was entered into before or after coverture. The husband, by marriage, acquires an interest in all existing contracts at any time made with his wife. An alien enemy is not *civiliter mortuus*; he is capable of being an executor, and it seems that he may sue as such: 1 Wms. Exors. p. 187. The dicta of the text writers are founded principally on the authority of *Deerly v. The Duchess of Mazarine* (*a*) and *De Gaillon v. L'Aigle* (*b*), but these cases have been overruled by *Marshall v. Rutton* (*c*).

POLLOCK, C. B.—The replication is bad. Whether the contract was entered into before or after marriage, the wife cannot sue alone. That is said to be a hardship, inasmuch as the husband is an alien enemy; but in reality it is no hardship, for all the rights of an alien enemy are forfeited to the Crown, and the proper course of proceeding is for the Crown to entitle itself to those rights by having an inquisition, and then, after enforcing this right of action against the defendant, to deal justly, by giving the wife the benefit of it, taking care that the husband gets nothing which he could employ adversely to the State. If the contract was entered into after the marriage, the case is quite clear; but it is argued that we ought to read these pleadings as if the contract took place before the marriage. If that question had rested upon the fact of the plaintiff and her husband being of the same name, that would merely have furnished an argument of probability; but it is distinctly stated in the replication that the cause of action accrued to

(*a*) 1 Salk. 116; 1 Ld. Raym. 147. (*b*) 1 Bos. & P. 357.
 (*c*) 8 T. R. 545.

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the plaintiff whilst she was living separate and apart from her husband. For these reasons I think that the defendant is entitled to judgment.

MARTIN, B.—I am of the same opinion. In either view the replication is bad. Assuming the contract to have been made after marriage, it was the husband's contract, and he might have sued alone upon it. I doubt whether the principle of the wife being allowed to join, where she is the meritorious cause of action, applies to a case like this; but at all events she cannot sue alone. Then, assuming the contract to have been made before marriage, the effect of the marriage is to vest the right of action in the husband, so that the necessity of his being joined arises from the interest being in him. There is no authority for saying that an alien enemy is *civiliter mortuus*; he is alive, but under a disability. The subject is discussed in a note to *Clementson v. Blessig* (a), where authorities are cited to shew that a declaration of war renders void contracts then existing between the belligerent parties. But I apprehend that nothing can render void a valid contract, except an act of parliament.

BRAMWELL, B.—I am also of opinion that the replication is bad. A contract made by a wife during coverture is a bargain by her on behalf of her husband, and he has a right to sue alone upon it. Then, suppose the contract was made before coverture, the replication is bad on the ground that the husband and wife *must* join in the action.

Judgment for the defendant.

(a) 11 Exch. 135.

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TARRABOCHIA v. HICKIE.

May 30.

THE declaration stated, that the plaintiff and defendant agreed by charter-party that the plaintiff's ship, called the "Dominica," then lying at Fiume, being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed sail and proceed to Cardiff, and there load from the factors of the defendants a full and complete cargo of coals in the customary manner, to be loaded in twenty days from the day on which the vessel was ready to load, which the defendants bound themselves to ship, and being so loaded should therewith proceed to Malta, Corfu, Smyrna, Athens, Alexandria, Constantinople, or Gallipoli, as ordered on signing bills of lading, or as near thereunto as she might safely get, and there deliver the same into craft alongside steamer or depot ship there, as might be directed by the consignee, being paid freight on the quantity delivered at the rate of 42*s.* 6*d.* per ton of twenty cwt. delivered, &c., and being in full of all port charges and pilotages, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the said voyage always excepted), the freight to be paid on the right and true delivery of the cargo in cash at the current rate of exchange, &c. —Averment: that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at Cardiff, and that the time for so doing has elapsed. Breach.—That the defendants made default in loading the agreed cargo.

The stipulations in a charterparty that the vessel, being tight, staunch and strong, shall sail with all convenient speed, are not conditions precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated.

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Pleas.—First, that the plaintiff's ship was not tight, staunch, or strong, or fitted for the voyage in the charter-party in that behalf mentioned, as she was required to be by the said charter-party, insomuch, that by reason thereof the object of the said charter-party, and of the voyage therein-mentioned, was wholly frustrated, and the defendants were prevented from deriving, and did not derive any benefit therefrom.

Secondly.—That the said ship did not with convenient speed, or in a reasonable time in that behalf, sail or proceed to Cardiff as required by the said charter-party, insomuch that by reason thereof the object of the said charter-party, and of the voyage therein-mentioned, was wholly frustrated, and the defendants were prevented from deriving, and did not derive any benefit therefrom.

Replication.—The plaintiff joins issue upon both the defendant's pleas.

At the trial, before *Cresswell*, J., at the last Gloucester assizes, it appeared that the charter-party was entered into on the 22nd April, 1854. On the 29th of the same month, the vessel not being then ready to sail, an accident occurred while tightening the rigging, which rendered it necessary to have a new topmast, and the sailing of the vessel was in consequence delayed. On the 15th of May, the vessel being then about to sail, fouled her cable, whereby she was delayed until the 19th. On that day she sailed from Fiume; and, on the 20th, was compelled by stress of weather, to enter the harbour of Sossino. She remained there until the 26th, when she proceeded on her voyage; and on the 16th of August arrived at Cardiff. The defendant then refused to load.

The learned Judge left it to the jury to say, whether the vessel was tight, staunch, and strong when she sailed from Fiume; and if not, whether the object of the voyage was

thereby frustrated ; also, whether the vessel sailed and proceeded to Cardiff with convenient speed or in a reasonable time ; and if not, whether the object of the voyage was thereby frustrated. The jury found that the vessel was not tight, staunch, or strong when she sailed from Fiume, but that she was so when she arrived at Cardiff ; and that the object of the voyage was not thereby frustrated. The jury also found, that the vessel did not with all convenient speed, or in a reasonable time, sail and proceed to Cardiff, but that the object of the voyage was not thereby frustrated. A verdict was then entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him.

Keating, in the following term, obtained a rule nisi accordingly, against which

Whately and *Huddleston* now shewed cause.—The stipulations in the charter-party that the vessel, being tight, staunch and strong, shall sail with convenient speed and within a reasonable time, are conditions precedent to the plaintiff's right to enforce the contract. In *Glaholm v. Hays* (*a*) the charter-party provided that the vessel should proceed to Trieste, and there load a full cargo, “the vessel to sail from England on or before the 4th of February next ;” and that was held to be a condition precedent on the part of the owner, upon the noncompliance wherewith the freighters were at liberty to throw up the charter. *Tindal*, C. J., in delivering the judgment of the Court, said, “The very words themselves ‘*to sail* on or before a given day,’ do by common usage import the same as the words ‘*conditioned* to sail,’ or ‘*warranted* to sail on or before such a day.’” So in *Ollive v. Booker* (*b*), where the vessel was described in the charter-party as “now at sea, having sailed three weeks ago,” that

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was held to amount to a warranty. In like manner the statement that the vessel is tight, staunch and strong, is a warranty that she fulfils that description. In *Oliver v. Fielden* (a), the stipulation was that the vessel should be "ready to receive cargo in all May," and that was held a condition precedent. *Cranston v. Marshall* (b) is also an authority that a statement as to the time at which a vessel will sail is not a mere representation, but a warranty. In *Clipsham v. Virtue* (c) there was no stipulation that the vessel should proceed in any particular time; and where no time is specified the law implies a reasonable time.—They also referred to *Ellen v. Topp* (d).]

Keating and *Phipson* appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B.—The rule must be absolute. The first plea alleges that the vessel was not tight, staunch, or strong, and that by "reason thereof the object of the charter-party and of the voyage was wholly frustrated." The latter is a material allegation, and the jury have found it in the negative. The question then is, whether the fact of the vessel not being tight, staunch, or strong, is a condition precedent to the performance by the defendant of his contract. I think not. In like manner, it is not a condition precedent that the vessel should sail with convenient speed or in a reasonable time. Where, indeed, the charter-party provides that the vessel shall sail on a particular day, that is a condition precedent. The distinction is obvious: where a particular day is named it is evidently the intention of the parties that the vessel shall sail on that day; and if the shipowner refuses to do so the

(a) 4 Exch. 135.
 (c) 5 Q. B. 265.

(b) 5 Exch. 395.
 (d) 6 Exch. 424.

merchant may decline to load, for the voyage is thereby altered, and the success of the adventure may depend on the vessel sailing on the day named. In Abbott on Shipping, part 4, c. 1, s. 5, it is said,—“Whether or not a particular covenant by one party be a condition precedent the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them. An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed.” There can be no doubt about a particular day; but what is a “convenient speed” or a “reasonable time” must always be a subject of contention. We may therefore fairly say, that where a particular day is named the time is unambiguously expressed, but where the terms are so lax and ambiguous as to lead to a difference of opinion, then the stipulation is not a condition precedent. The general rule laid down by Lord *Ellenborough* in *Davidson v. Guyenne* (a) is, “that unless the nonperformance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.” Applying that rule to this case, the jury have negatived an allegation which is the substance of each plea; consequently the pleas were not proved, and the rule must be absolute.

MARTIN, B.—I am of the same opinion. The jury having negatived the allegation that “the object of the charter-party and of the voyage therein mentioned was wholly frustrated,” that part of the pleas must be considered

(a) 12 East, 381.

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as struck out, and then all that remains is that the ship was not tight, staunch or strong, or fitted for the voyage, and that the ship did not sail with convenient speed or in a reasonable time, which are mere traverses of those averments in the declaration. For at least twenty years, it has been considered that traverses of such averments are bad in law, as raising immaterial issues; and for the reasons stated by the Lord Chief Baron it is clear that if the latter allegation in the pleas was struck out, they would be bad on demurrer, and that the plaintiff would be entitled to the verdict though the jury found them against him. In the case of *Hall v. Cazenove* (a), the charter-party contained a covenant that the ship should sail on or before the 12th February, and *Le Blanc*, J., said,—“If the defendant sustained any damage by reason of the ship's not having sailed on the particular day, he may recover it by bringing his action on the covenant; but, at any rate, the objection does not go to the plaintiff's right of action on the ground of a condition precedent.” But however that may be, my judgment is founded on this, that the terms used in this charter-party do not amount to a condition precedent.

**BRAMWELL, B.**—I am of the same opinion. No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intended to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves. If the contract is to load at a particular port, the very language compels us to construe that as a condition precedent. So in the case of

(a) 4 East, 477.

*Glaholm v. Hays* (*a*), where the agreement was that the vessel should sail on a particular day. In the present case the only thing which made me doubt was an expression of *Maule*, J., in *Glaholm v. Hays* (which is a dictum rather an authority.) He says in the course of the argument,—“It will be said that if the sailing on the 4th February is a condition precedent, in this case the sailing within a reasonable time would also have been held to be a condition precedent. There is a difficulty in saying that one is to be a condition precedent and not the other.” But the case of *Freeman v. Taylor* (*b*) is an express authority that the sailing within a reasonable time is not a condition precedent.

Rule absolute.

(*a*) 2 Man. & G. 257.

(*b*) 8 Bing. 124.

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JONES v. LEES.

June 4.

**C**OVENANT.—The declaration stated that, by an indenture made between the plaintiff of the one part, and the defendant of the other, it was agreed that the plaintiff, having obtained a

patent for improvements in slubbing machines for a term of fourteen years, by indenture granted to the defendant licence to use the invention in England both in the making of new machines and the alteration and adaptation of old ones, and to sell the articles so produced, adapted, and applied, for the residue of the term of fourteen years, paying to the plaintiff a certain royalty; and the defendant covenanted with the plaintiff, that he would not during the continuance of the licence make or send any slubbing machines without the invention of the plaintiff applied to them.—Breach: that the defendant made and vended large numbers of such machines without the invention of the plaintiff applied to them.—Plea: that the defendant made and sold several slubbing machines with the plaintiff's invention applied to them, and was at all times ready and willing to use the invention in practice, and that he used his best endeavours to procure manufacturers to employ him to make slubbing machines with the invention applied thereto, and to purchase them from him: nevertheless the invention was so worthless, that he was unable to induce any person to employ him to make any machines with the invention applied thereto, or to alter or adapt any old machines to it, or to use the invention in any other manner, or to induce any person to purchase any machine with the invention applied thereto: by reason whereof the defendant was unable to use or vend the invention, or use the licence, which became wholly useless to him, wherefore he made and vended machines without the invention applied.

Held, first that the covenant in the declaration was not void, as being in restraint of trade. Secondly, that the plea was bad, since it was a plea to the damages only.

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and the defendant of the other part, reciting that the plaintiff was the true and first inventor of certain improvements in machinery for preparing, slubbing, roving, spinning, and doubling cotton, silk, wool, worsted, flax, and other fibrous substances; and that the invention was new "as to its public use" &c., and reciting the grant of letters patent to the plaintiff for the said invention for the term of fourteen years; and that, in pursuance of a proviso therein contained, the plaintiff had enrolled a specification in the Court of Chancery: also reciting that the plaintiff had contracted and agreed with the defendant to grant to him, his executors, &c., a licence to make, use, exercise, and vend the said invention according to the specification so enrolled, upon the terms and conditions thereafter mentioned: and the plaintiff, in consideration of the reservations, covenants, provisoies and agreements thereafter contained, did give and grant unto the defendant, his executors, full and free liberty, licence, power, &c., to use, exercise, and put in practice the said invention in England, both in the making of new machines, the alteration and adaptation of old machines, and otherwise, and to vend, use, sell, and dispose of all the articles so produced, adapted and applied, when, where, and as the defendant, his executors, &c. should think fit, within the limits aforesaid, for the residue of the term of fourteen years, granted by the letters patent, yielding and paying unto the plaintiff, his executors, &c., the sum of 1*s.* 6*d.* for each and every spindle contained in each and every slubbing and roving frame to which the said invention should be applied, and in which the lift should exceed eight inches, &c., (and containing further provisions as to the mode and times of payment): the defendant did, for himself, his executors, &c., covenant with the plaintiff, his executors, &c., that he should not, nor would, during the continuance

of the licence thereby granted, make or vend any slubbing or roving frames whatever without the invention of the plaintiff applied to them—Breach: that after the making of the indenture, and during the continuance of the licence, the defendant disregarded his covenant in that behalf, made and vended divers large numbers of slubbing and roving frames, without the said invention of the plaintiff applied to them, contrary to his covenant in that behalf.

Plea: that after making the indenture, and within one year next after the date of the same, the defendant made divers, to wit, eight slubbing frames and nine roving frames, to each and every of which the said invention had been and was then applied by the defendant, according to a certain sample frame or machine, which had been and was made and set up under the superintendence and direction of the plaintiff, and in the manner in which the said invention had been and was by the plaintiff applied to the said sample machine; and the defendant then sold divers frames so made to divers persons, who purchased the same: that after the making and selling of such frames, and at all times afterwards during the continuance of the said license, the defendant was ready and willing and offered to use, exercise, and put in practice, the said invention, both in the making of other new slubbing frames, roving frames, spinning machines, and doubling machines, and other frames and machines; and in the alteration and adaptation of old slubbing frames, roving frames, &c., and was ready and willing, and offered to vend, sell, use, and dispose of the frames, machines, and articles so produced, made and adapted; and during the times aforesaid the defendant used his best and utmost endeavours to induce and procure manufacturers of cotton and others to employ the defendant to make other slubbing frames, roving frames, spinning machines and doubling machines, and other frames and machines, with the said invention applied thereto, and to

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purchase and take the same of and from the defendant; and also to employ the defendant to apply the said invention to other slubbing frames, roving frames, &c. Nevertheless, the said invention, and frames and machines to which the said invention had been and was applied, was and were of so little value and utility, and was and were so defective and worthless, that without, and not by reason of any neglect or default of the defendant, he was at all times, during the continuance of the said license, wholly unable to induce or procure any persons or person to employ the defendant to make any frames or frame, machines or machine, articles or article, with the said invention applied thereto, or to alter or adapt any old frames or machines, or to apply the said invention, or to use, exercise, or put in practice the said invention in any other manner, and was also wholly unable to induce or procure any persons or person to purchase any such machine with the said invention applied thereto. And the defendant, during all those times, by reason of the premises, was prevented from and was wholly unable to use, exercise, put in practice, or vend the said invention, and was prevented from and was wholly unable to use, exercise, or put in practice the said license in and by the said indenture supposed to be granted, or any part thereof; and the said invention and license became and were wholly useless to the defendant, and the license is of no use, benefit, or effect; wherefore the defendant made and vended slubbing frames and roving frames without the said invention applied to them, as in the said breach alleged.

Demurrer and joinder therein.

*Grove (Chandler with him)* in support of the demurrer.—The plea affords no answer to the action. In effect it amounts to this: that after the defendant had entered into the contract he found that he had made a bad bargain.

The Court then called on

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*Atherton*, (*Hindmarch* with him.)—The covenant is void as being in restraint of trade. All contracts in restraint of trade are void, unless the circumstances shew that the restriction is reasonable. *Mallan v. May* (a), *Horner v. Graves* (b), *Hitchcock v. Coker* (c). This covenant binds the defendant not to make or vend any slubbing or roving frames whatever without the invention of the plaintiff applied to them, in any part of England for the space of fourteen years. Such a restraint is unreasonable and injurious to the interests of the public. The plea shews that the invention is useless, and therefore, if the covenant is binding, it amounts, in effect, to an absolute prohibition. [*Alderson*, B.—The same consequence would follow if the plaintiff made an improvement upon his invention, or a third person invented a machine more useful than the plaintiff's.] Moreover, if this contract is valid, a similar one with any other person would be valid also, and thus the plaintiff, by obtaining contracts of this kind with every manufacturer in England, would get a monopoly of the trade.

*POLLOCK*, C. B.—Our judgment must be for the plaintiff. The plea is substantially a plea to the damages only. Then with respect to the declaration: it would be a very mischievous decision if we were to hold that a contract, which it may be presumed was reasonable at the time it was entered into, might be construed as a contract in restraint of trade because something more useful than the subject-matter of it has been invented, or the habits of society have changed. If the covenant had been that

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| (a) 11 M. & W. 653. | (b) 7 Bing. 735. |
| (c) 6 A. & E. 438.  |                  |

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neither the defendant nor his executors would make any of these machines for a thousand years, that would, no doubt, have been an unreasonable restraint; but the restriction is only during the continuance of the licence.

ALDERSON, B.—I am of the same opinion. This is nothing but a plea to the damages, for if the plea be true, the plaintiff has sustained no damage. If the defendant could not have sold any thing but what was of no value, then the plaintiff has lost nothing by the breach of covenant.

BRAMWELL, B.—I am of the same opinion. No doubt the Court may see that a stipulation which a person has entered into to bind himself and his capital, is made without a reasonable consideration. On the other hand, we ought to see that very clearly before we interfere. Here the plaintiff is owner of a patent for a term of fourteen years, and he assigns his interest in it to the defendant, who covenants that he will not, during the term, make or sell any slubbing machines without that invention applied to them. How can we say that such a contract is unreasonable? It is objected that the restraint extends to all England; but so does the privilege. The cases with respect to the sale of a good-will do not apply, because the trade, which is the subject-matter of the sale, is local, and therefore a prohibition against carrying it on beyond that locality would be useless; here, however, there is no limit to the place within which the licence is to be exercised.

Judgment for the plaintiff (*a*).

(a) See *Hayne v. Maltby*, 3 T. R. 438.

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## JERVIS v. TOMKINSON, and others.

June 10.

**T**HE declaration stated that the plaintiff, by deed, let to the defendants the lower mine of rock salt, or salt rock, to the defendants a certain mine of rock salt for twenty-one years from the 25th June, 1851: and the defendants covenanted with the plaintiff, that they would in every year during the term, get and raise from the mine 2000 tons of rock salt, and in case of default would, at the expiration of the year, pay the plaintiff 6d. a ton for every ton by which the quantity was less than 2000: and also that they would, with all reasonable diligence, sink a shaft to the salt rock in order to get at the salt: and would also during the continuance of the term, work the mine in a proper and workmanlike manner.—First breach: that although the defendants did not raise or get out of the mine the annual quantity of 2000 tons of salt, yet they have not paid for the quantity short of 2000 tons.—Second breach: that the defendants did not in every year of the term get and raise 2000 tons, and did not pay for the quantity short of 2000 tons, but on the contrary got and raised no salt whatever, and refused to pay the plaintiff any sum whatever.—Third breach: that they did not use all reasonable diligence to sink a shaft to the salt rock in order to get at the salt; but wholly omitted and neglected so to do.—Fourth breach: that the defendants did not during the continuance of the term work the mine in a proper and workmanlike manner, but permitted the same to be unworked. The defendants pleaded, Secondly: that the deed provided that in case the rock salt should, during the continuance of the term, fail by any inevitable accident, then, on payment of all rent due and performance of all covenants on the part of the defendants, the term should cease and determine to all intents and purposes whatsoever: that the salt during the continuance of the term failed by inevitable accident; that all rent due was paid and covenants performed; and thereupon the term ceased and determined. Thirdly to the third breach: that the defendants did with all reasonable diligence sink a shaft to the salt rock. Fourthly to the fourth breach: that the defendants did at all times during the continuance of the term work the mine in a proper and workmanlike manner. Upon which pleas issues were joined. At the trial it appeared that by an agreement in writing, dated the 29th August, 1851, the plaintiff agreed, before the 25th March then next, to demise to the defendants the salt mine in question for twenty-one years from the 25th June, 1851. When the agreement was executed, the defendants began to sink a shaft for the purpose of getting the salt. This sinking was, in September, 1851, discontinued in consequence of an influx of brine. The defendants thereupon began to sink another shaft which was in the same month discontinued from the like cause. On the 16th November, 1852, a lease, pursuant to the agreement, was executed, being the deed declared on and which contained the proviso for cesser stated in the second plea. In consequence of the influx of brine before mentioned the defendants, never in any manner worked the mine, nor paid any of the rents. The jury found that the defendants could not have worked the mine by any reasonable application of labour, diligence, skill, money or other means, and that they were prevented from working it by the influx of brine.

*Held:* First, that as the term commenced in point of interest on the 16th November, 1852 though its duration as to computation of time was to be reckoned from the 25th June, 1851, the proviso for cesser, which referred to a failure by inevitable accident *during the continuance of the term*, never came into operation; and that as the defendants had entered into an absolute unqualified covenant to get 2000 tons of rock salt in each year, or pay for the deficiency, they were liable; for whether the salt could be got easily or with difficulty, or whether it existed at all, was immaterial.

Secondly: that the plaintiff was entitled to the verdict on the issue raised by the third plea, for the defendants having, after their inability to reach the salt by reason of the influx of brine, covenanted with all reasonable diligence to sink the shafts down to the salt, they were bound to do so, although it might be an unreasonable application of time and labour.

Thirdly: that the plaintiff was also entitled to the verdict on the issue raised by the last plea, since the defendants must be taken to have covenanted to work the mine in *some way*, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether.

*Sensible:* that if the lease had been executed before the interruption of the works by the influx of brine, that would have been "a failure by inevitable accident" within the proviso for cesser.

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within and under certain land of the plaintiff: To hold for twenty-one years from the 25th day of June, A.D. 1851, determinable, nevertheless, as in the said deed mentioned: Yielding and paying (amongst other things) in manner following—that is to say, (in case in any year of the said term the defendants should not raise and get from and out of the said mine and premises the full annual quantity of 2000 tons of Prussian or export rock salt, or salt rock), at the expiration of every such year unto the plaintiff the sum of 6d. for each and every ton by which the quantity of Prussian or export rock salt had, raised and gotten in such year should fall short of the full quantity of 2000 tons. And the defendants covenanted with the plaintiff (amongst other things) that they would in each and every year during the continuance of the said term, get and raise from and out of the said mine and premises 2000 tons, at the least, of Prussian or export rock salt, and in case of any default in the performance thereof, then and in every such case the defendants would, at the expiration of each and every year in which they should get and raise a less quantity of Prussian or export rock salt than 2000 tons, pay to the plaintiff the sum of 6d. for each and every ton by which the quantity of Prussian or export rock salt so raised or gotten in such year should be short of 2000 tons: and also that they would, with all due and reasonable diligence and dispatch, sink down the shaft or shafts then in part made and intended to be thereafter made on the land of the defendants in the said deed mentioned and described, to the rock salt or salt rock thereunder, and drive through the last mentioned salt rock or rock salt as soon as might be, in order to work and get the rock salt or salt rock and premises thereby demised: and also would work the said mine and premises thereby demised thirteen feet in thickness or depth at the least, in all parts except where pillars

should be necessary as in the said deed specified: and also that they would, at all times during the continuance of the said term, carry on, get and work the said rock salt mine and premises thereby demised, in a careful, prudent, proper and workmanlike manner in all respects.—First breach: that although in each of the two first years of the said term the defendants did not raise or get from and out of the said mine and premises the full annual quantity of 2000 tons of Prussian or export rock salt or salt rock, yet the defendants did not, at the expiration of either of the said years, or at any time hitherto, pay to the plaintiff the sum of 6d. for each and every ton by which the quantity of Prussian or export rock salt had, raised or gotten in such years respectively fell short of the full quantity of 2000 tons; but the sum of 50*l.* became due from the defendants to the plaintiff at the expiration of each of the said years respectively for 2000 tons by which the quantity of Prussian or export rock salt raised or gotten in each of the said years respectively fell short of such full quantity: and each of the said sums of 50*l.*, amounting to the sum of 100*l.*, is wholly due and unpaid.—Second breach; that the defendants did not, in each and every year during the continuance of the said term, get and raise from and out of the said mine and premises 2000 tons, at the least, of Prussian or export rock salt: and did not, at the expiration of each and every year in which they raised a less quantity of Prussian or export rock salt than 2000 tons, pay to the plaintiff the sum of 6d. for each and every ton by which the quantity of Prussian or export rock salt so raised or gotten in such year was short of 2000 tons; but on the contrary, in each of the first two years of the said term, the defendants got and raised from and out of the said mine and premises no Prussian or export rock salt whatsoever, and wholly neglected and refused to pay the plaintiff at the expiration of the said years, or at any time thence hitherto, any sum

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whatsoever.—Third breach: that the defendants did not, with all due and reasonable diligence and dispatch, sink down the said shaft or shafts hereinbefore mentioned and described to the rock salt or salt rock in the said covenant in that behalf mentioned, and drive through the said last mentioned rock salt or salt rock as soon as might be, in order to work and get the rock salt or salt rock and premises demised to them as aforesaid, but, on the contrary thereof, wholly omitted and neglected so to do.—Fourth breach: that the defendants did not, at all times during the continuance of the said term, carry on, get and work the said rock salt mine and premises in a careful, prudent, proper and workmanlike manner in all respects, or in any manner whatsoever, but on the contrary, suffered and permitted the same to remain and continue, and the same were not carried on, and were wholly ungotten and unworked from the time of the making of the said deed hitherto.

Pleas.—First: that the plaintiff did not let to the defendants, nor did the defendants covenant with the plaintiff as in the declaration alleged.

Second.—That in and by the said deed it was provided, declared and agreed by and between the plaintiff and the defendants, that in case the rock salt or salt rock within and under the said land of the plaintiff should, during the continuance of the said term, fail by any inevitable accident, then, on payment of all rent due and arrears of rent in respect of the said mine and premises demised, and on performance, in all respects, of all and every the covenants, conditions and agreements in the said deed mentioned, and on the part and behalf of the defendants to be observed, fulfilled and performed, the said term of twenty-one years, or the residue thereof then unexpired, should cease and determine to all intents and purposes whatsoever, anything therein contained to the contrary in anywise notwithstanding.—Averments: that the salt rock and rock salt

within and under the land of the plaintiff, during the continuance of the said term, failed by inevitable accident, and that all rent due and arrears of rent in respect of the said mine and premises demised were duly paid, and all and every the covenants, conditions and agreements in the said deed contained, and on the part and behalf of the defendant to be observed, fulfilled and performed, were duly performed in all respects; and that thereupon afterwards, and before any of the supposed breaches of covenant in the declaration mentioned, the said term of twenty-one years, and the residue thereof then unexpired, ceased and determined to all intents and purposes.

Third.—As to so much of the declaration as alleges that the defendants omitted and neglected to sink down with all due and reasonable diligence and dispatch the said shaft or shafts to the rocks salt or salt rocks, the defendants say that they did with all due and reasonable diligence and dispatch sink down the said shaft or shafts to the rock salt or salt rock.

Fourth.—As to so much of the declaration as alleges that the defendants did not, at all times during the continuance of the said term, carry on, get and work the said rock salt mine and premises in a careful, prudent, proper and workmanlike manner in all respects, the defendants say that they did, at all times during the continuance of the said term, carry on, get and work the said rock salt mine and premises in a careful, prudent, proper and workmanlike manner.

The replication joined issue on the pleas.

On the trial, before *Williams* J., at the Cheshire Spring Assizes, 1855, a general verdict was entered for the plaintiff, damages 100*l*. A rule nisi having been granted to set aside the verdict, the following case was, by consent of the parties, stated for the opinion of this Court.—

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By an agreement in writing, dated the 29th August, 1851, made between the plaintiff and defendants, the plaintiff (amongst other things) covenanted and agreed with the defendants that he would on or before the 25th day of March then next ensuing, grant and demise to the defendants the lower mine of rock salt or salt rock within and under certain land of the plaintiff, at Witton-cum-Twambrookes, &c., with free liberty, power and authority for the defendants, during the time thereafter mentioned, and pursuant to the covenants to be contained in the said lease, to get and take all such lower rock salt or salt rock as should be found within or under the said land, and to carry away and dispose of the same: To hold the same unto the defendants their executors, &c., from the 25th day of June then last past for the term of twenty-one years, at and under the several rents, and subject to the several covenants and provisoies therein mentioned, which were in terms the same, rents, covenants and provisoies as were contained in the lease afterwards granted in pursuance thereof.

At the time of the execution of this agreement the defendants began to sink a shaft on a piece of land belonging to them, adjoining the lands mentioned in the agreement, for the purpose of getting the rock salt referred to in the agreement. The sinking of this shaft was in September, 1851, discontinued in consequence of an influx of brine, which interrupted the progress of the work. The defendants thereupon began to sink a second shaft in another part of the same piece of land, which shortly afterwards, in the same month of September, was discontinued, from the like cause. From these shafts the defendants had intended to drive levels under their land to the plaintiff's mine of rock salt, and so to get the same.

On the 16th day of November, 1852, a lease, pursuant

to the agreement, and a counterpart thereof, were executed and delivered by the plaintiff and defendants respectively.—The case set out the lease, which was for twenty-one years, from the 25th June, 1851. The reddendum commenced with a reservation of a rent of 6d. per ton, and also in proportion, for a less quantity than a ton of rock salt, at any time during the continuance of the term, gotten from the mine; “to be paid half yearly, on the 29th September and 25th March in each year, in respect of the rock salt which shall have been raised or gotten during the preceding half year; the first of such payments to be made on such one of the said days as shall first and next happen after any rock salt shall have been raised or gotten from and out of the said mine.” Then followed the reservation (stated in the declaration) of 6d. per ton for any quantity gotten in a year, less than 2000 tons. The lease also contained the following covenant on the part of the defendants:—“And also shall and will, in case the said rock salt mine and premises hereby devised shall, during the continuance of the said term hereby granted, be in danger of falling, by any inevitable accident whatever, at their own proper costs and charges use their utmost endeavours to protect the said rock salt mine and premises from injury or prejudice.” The proviso for cesser was as follows:—“Provided also, and it is hereby further declared and agreed by and between the said parties to these presents, that in case the rock salt or salt rock within and under the said land, &c. shall, during the continuance of the said term hereby granted, fail by any inevitable accident, or if the mine of rock salt or salt rock hereby demised shall be worked out and exhausted at any time during the said term, then and in either of the said cases, upon payment of all rent due and arrears of rent in respect of the said mine and premises hereby demised, and on performance in all respects

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of all and every the covenants, conditions, and agreements herein contained, and on the part and behalf of the said R. Tomkinson, &c. (the defendants) to be observed, fulfilled and performed, the said term of twenty-one years hereby granted, or the residue thereof then unexpired, shall cease and determine to all intents and purposes whatsoever, anything herein contained to the contrary in anywise notwithstanding."

In consequence of the influx of brine before mentioned the defendants have never in any manner worked the plaintiff's mine of rock salt demised by the said lease, nor raised or got any rock salt therefrom, nor driven through the rock salt under their own piece of land mentioned in the said lease, in order to work or get the demised mine. Neither have they paid any or any part of the several rents reserved by the said lease (a).

In answer to questions left by the learned Judge to the jury, they found that the defendants could not have worked the plaintiff's mine "by any reasonable application of labour, diligence, skill, money or other means;" and that "they were prevented from working it by the influx of brine."

The question for the opinion of the Court is, whether, under the circumstances stated, the defendants have a defence to this action under the proviso for cesser of the said lease, or under any other of the pleas. If the Court shall be of opinion in the affirmative, a verdict is to be entered for the defendants; if not, the verdict is to stand for the plaintiff.

*Welsby (Sumner with him), argued for the plaintiff, in*

(a) The case then set out a long correspondence between the parties and their solicitors prior and subsequent to the agreement for the lease: it also set out part of the evidence at the trial. See judgment, p. 206.

last Michaelmas Term (Nov. 21).—It is a condition precedent to the cesser of the lease, that all the covenants should have been performed; *Grey v. Friar* (*a*). But the case finds that none of the rents have been paid, and that the demised mine has never been worked.

The Court then called on

*Grove* (*M'Intyre* with him), for the defendants.—No rent was ever payable, because the defendants never reached the salt rock. The true construction of the lease is, that the defendants shall use all reasonable diligence to get at the salt rock; if they reach it, then they are bound to work it in the manner provided, and the rents reserved become payable; but if they are prevented from getting at it by natural causes, then the lease is to become void. It is evident that the intention of the parties was, that no rent should be payable unless *some* rock salt was gotten, for the rent of 6d. per ton is payable half yearly, the first payment to be made on the first half year *after any rock salt is gotten*. The parties having in the first place provided for payment when *some* rock salt has been gotten, go on to provide for payment if in any one year a less quantity than 2000 tons shall be gotten. That provision is qualified by the previous one, and does not take effect until *some* rock salt has been gotten. The language of the covenant is, not that the defendants will pay the rent if no rock salt has been gotten, but that they will pay if a quantity less than 2000 tons has been gotten. But the jury have found, that the defendants could not have worked the mine by any application of labour, diligence, skill, money, or other means, and that they were prevented by the influx of brine. [*Parke*, B.—The question is, whether the defend-

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ants have not contracted to get 2000 tons a year or pay for them.] If the covenant be construed to mean, that they shall pay at the end of every year after the commencement of the term, though no rock salt has been gotten, that would be inconsistent with the reservation of rent *after* any rock salt has been gotten. The intention was, that there should be an annual rent in respect of 2000 tons so soon as some rock salt had been gotten. The words in the proviso, "in case the rock salt fails," are not used in the sense of an entire absence of salt, but include the inability to get it. The proviso contemplates two contingencies, the failure of the salt by inevitable accident, and its becoming worked out and exhausted. It is not a mere proviso for re-entry, which the lessor has the option of enforcing, but a stipulation which, in a given event, renders the lease absolutely void. It would, indeed, seem from the decision in *Doe d. Bryan v. Bancks* (*a*), that under such a proviso the lease is merely void at the option of the lessor; but in *Dakin v. Cope* (*b*), Lord *Eldon* expressed considerable doubt with respect to that decision. [Pollock, C. B.—There is a difference between the determination of a lease, in the nature of a penalty, and the determination by reason of some contingency which renders it neither just nor equitable that the parties should be bound by it.] In Co. Litt. 215, it is said, "that where the estate or lease is ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance; otherwise it is of an estate or lease voidable by entry." The same distinction is pointed out in *Mulcarry v. Eyres* (*c*), and *Finch v. Throckmorton* (*d*).

*Welsby*, contrà.—First, the proviso for cesser never came

(*a*) 4 B. & Ald. 401.

(*c*) Cro. Car. 511.

(*b*) 2 Russ. 170.

(*d*) Cro. Eliz. 231.

into operation. In November, 1852, and after the events occurred upon which the defendants rely as creating the cesser, they executed the lease, and thereby covenanted absolutely to get 2000 tons of rock salt before the end of the year, or pay for the deficiency. The first reddendum is of a *mine rent*, and is only payable in respect of rock salt raised or gotten; the other reddendum differs both as to the mode and time of payment. It provides, that in case, *in any year* of the term, the defendants shall *not raise and get* out of the mine 2000 tons of rock salt, that they will, *at the expiration of each year*, pay 6d. for every ton by which the quantity raised and gotten shall fall short of 2000 tons. The event has happened upon which the liability to pay accrued, for the defendants, having failed to get any salt at all, have obviously failed to get the prescribed quantity. The only difficulty arises from the introduction into the clause of the words, "raised and gotten." The object was, to provide for payment of rent in respect of that quantity of salt which might, in contemplation of the parties, be gotten within the year. The defendants have entered into an absolute unqualified covenant to get at least that quantity in every year of the term, or pay for the deficiency; and that is not effected by the proviso for cesser. The language of the proviso is, "that if the salt shall, *during the continuance of the term*, fail by any inevitable accident," &c.; but there has been no failure during the term, for no attempt has been made to get the salt since the lease was granted. The defendants executed the lease with full knowledge that they could not get the salt. The argument on the other side would go to this extent that the proviso for cesser determined the lease *eo instanti* that it was granted.—Secondly, assuming the proviso for cesser to have come into operation, the inability to get the salt rock by reason of the influx of brine, is not a

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"failure of the mine by inevitable accident, within the meaning of the proviso. Some light is thrown on the meaning of that term by the covenant, to protect the mine if "in danger of failing by inevitable accident."—Thirdly, the proviso does not render the lease void, but only voidable at the option of the lessor. [Parke, B.—The habendum of a lease must be construed as taking effect from the time of its execution, though the duration of the term is to be computed from a prior day, it is so laid down by *Eyre*, C. J., in *Wyburd v. Tuck* (*a*), and by Lord *Hale* in *Dinsdale v. Isles* (*b*). The proviso clearly relates to some prospective matter.]—He also referred to *Jowett v. Spencer* (*c*).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was heard in Michaelmas Term last, and has stood over, not on account of any serious difficulty in it, but in consequence of the absence of some of the Judges who took part in it.

It came before us, myself, Barons *Parke*, *Alderson*, and *Platt*, on a special case in an action of covenant on a lease of salt mines, dated 16th November, 1852. The case states the pleadings and issue, which was tried before my brother *Williams* at Chester Spring Assizes, 1855; an agreement for a lease, dated 29th August, 1851, pursuant to which the lease was made, some of the evidence given on the trial, a long correspondence between the parties prior and subsequent to the agreement for a lease (which is wholly immaterial), the finding of the jury upon the evidence; and the question for the opinion of the Court is stated to be—whether, under the circumstances of the

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| <i>(a)</i> 1 Bos. & P. 464. | <i>(b)</i> 3 Keb. 207. |
| <i>(c)</i> 1 Exch. 647. | |

case, the defendants have a defence to the action under a proviso of cesser of the lease, or any other of the pleas pleaded; the verdict to be entered according to the direction of the Court.

(His Lordship then stated the pleadings, and proceeded.) —Upon the first issue no question arises; it must be undoubtedly found for the plaintiff. The second issue is the only important one; and the material question is, whether the term ceased by virtue of the proviso, as therein alleged. The proviso is, that if the salt during *the continuance of the term* should fail by any inevitable accident, then, on payment of rent due, and arrears of rent, and performance of all covenants, the term was to cease. The term unquestionably commenced, in point of interest, on the 16th November, 1852, through the duration of the term as to computation of time was to be reckoned from the 25th June, 1851. (See *Wyburd v. Tuck* (a), Lord Hale, 3 Keb. 207.) To cause the proviso to operate, there must have been a failure by inevitable accident *after the 16th November*, 1852, for the proviso clearly refers to some *future* inevitable accident, and that, during the *continuance* of the term, which did not begin until that day, whereas the accident which caused the failure of the salt is found by the special case to have occurred before the date of the lease, but after the date of the agreement for a lease and the commencement of operations under that agreement, by the discovery of brine in such quantities as to prevent the getting the rock salt at all. If the lease had been executed when the agreement was, viz. on the 25th August, 1851, the influx of brine, which appears to have taken place after sinking the shaft in September 1851, might have been, on the evidence, such an *inevitable accident* as to be within the proviso; and if so, no breach of the covenant, which was to get 2000

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tons before the end of the year, or pay for the deficiency at the end of the year, had taken place, and the proviso would have operated. But the lease not having been executed till November 1852, that inevitable accident which had occurred long before cannot be within the proviso. The defendants entered into the covenant knowing of the then state of the mine, and it being in that state, they positively covenanted to get the quantity of 2000 tons in every year, or pay for the deficiency at the end of it; and whether they could be got easily or with difficulty, or even whether they existed at all, is immaterial in this case of an absolute unqualified covenant: *Marquis of Bute v. Thompson* (a). If the defendants had meant it to depend upon any of those contingencies they should have so expressed themselves; they exonerate themselves, not by anything in the then condition of the mine, but if any subsequent inevitable accident should occur. If this lease does not express what the parties intended to have provided for, the remedy of the defendant is in a Court of equity for the reform of the lease: the construction of the lease as it is now, is clear. The verdict on the issue on the second plea must therefore stand for the plaintiff.

As to the issue on the third and fourth pleas, which only go to the damage incurred by the plaintiff in consequence of the two last alleged breaches, and are therefore less material, they give rise to some question. We think, however, that these issues should be found for the plaintiff. In the last breach but one, to which the third plea is pleaded, the plaintiff alleges that the defendants did not, with all due and reasonable diligence and dispatch, sink down the said shafts (those then made and intended to be thereafter made) to the rock salt, and drive through the rock salt as soon as might be, in order to work and get it. The defendants say that they did with

(a) 13 M. & W. 487.

all due diligence and dispatch sink down the said shafts to the rock salt.

On this issue, the proof of which lies on the plaintiff, the evidence appears to have been that after the date of *the lease* nothing whatever was done by the defendants towards sinking the shaft, but also the jury find that the defendants could not have worked the plaintiff's mine by any reasonable application of labour, diligence, skill, or money, or other means.

We think that this issue must be found for the plaintiff; for the defendants did not use due and reasonable diligence and dispatch with reference to the then state of the mine, to which the covenant applies. The defendants, after the interruption by the influx of the brine, and after the impossibility found by the jury, covenanted to sink the shaft to the salt rock with all due and reasonable diligence and dispatch. They have done nothing; they clearly covenanted according to the terms in the lease, to sink the shaft deeper; though it might be an unreasonable application of time and labour.

As to the last breach there is also a similar question. After *the date of the lease* the defendants did nothing whatever, and they must be taken to have covenanted to work the mine, though then in by no means a promising condition, in *some way*—in as prudent and proper way as they could under the circumstances. After that covenant they had no right to abandon the works altogether. Our judgment must be for the plaintiff.

Judgment for the plaintiff.

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**AIKEN, Public Officer, &c., v. ELIZABETH SHORT, Executrix
of FRANCIS SHORT.**

The defendant, an executrix, being entitled to 200*l.* lent by the testator in his lifetime, and secured to him by bond and an equitable mortgage, applied to C., the debtor, for payment. C. referred her to a bank which had purchased of him the mortgaged property, subject to the charges thereon. The bank paid the 200*l.* It turned out that by a will prepared and attested by the testator, and made subsequently to that under which C. had claimed, but which had been suppressed by the family of C., C. had no title to the property so charged.—*Held,* that the bank could not recover back the money as having been paid under a mistake of facts.

ACTION for money had and received.—Plea, never indebted.

At the trial before *Platt, B.*, at the Middlesex sittings, in last Hilary Term, the following facts were proved:—The defendant was the widow and sole executrix of Francis Short, who died in 1853. One Edwin Carter had made a will, dated February 1846, by which he gave his property equally amongst his eight brothers and sisters, of whom George Carter was one. This will was proved after his death, which took place in 1847, by John Carter the younger. George Carter being largely indebted to Stuckey's Banking Company, by deed dated the 15th January, 1855, conveyed to the Banking Company his one-eighth share in the property of Edwin Carter, to which he professed to be entitled under this will, subject to the charges upon it. George Carter was at that time indebted to the defendant, as executrix of Francis Short, in the sum of 200*l.*, which was secured by an equitable mortgage of the property devised to him by Edwin Carter's will, and by the joint and several bond of George Carter, John Carter and Charles Carter, dated October 1850. The equitable charge was recited in the deed of the 15th January, and at the time of the execution of that deed it was agreed, as between George Carter and the Bank, that the Bank should pay off this sum of 200*l.* and interest. In May 1855 the Bank made arrangements to sell the property. Before the execution of the conveyance one Richardson, acting as attorney for the defendant, applied to the Bank for payment of the 200*l.*, and interest, stating that he had applied to George Carter, who had referred him to the Bank. The Bank accordingly, through their attorney, paid to the defendant the sum of

226*l.* 16*s.* 6*d.* The bond and instrument of mortgage were handed over by the defendant to the Bank, and they took a receipt for the money due on the bond and mortgage. In August 1855 John Carter produced a will of Edwin Carter, dated April 1846, which appeared to be the true last will of Edwin Carter. This will, the existence of which had been kept secret by the Carters, had been prepared in the office of Francis Short, the defendant's testator, and was attested by him. Under this will George Carter took only an annuity of 100*l.*, which ceased upon his making any assignment. The Bank then applied to the defendant to refund the 226*l.* 16*s.* 6*d.* previously paid by them to her, and on her refusal to repay the money brought the present action to recover it back. Upon these facts, the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Montague Smith in the same term obtained a rule nisi accordingly, against which

Knowles and Field now shewed cause.—The action is brought to recover back money paid to the defendant under a mistake of fact. The defendant's testator had taken a security on the property given to George Carter under the first will. The second will had been prepared in his office, and was attested by him; therefore he had the means of knowing the invalidity of his own claim. The Bank having no means of knowing the facts, and supposing his security to have been valid, paid to his executrix the money now sought to be recovered back. To allow the executrix to keep it, would be to allow the testator to take advantage of his wrong. In *Kelly v. Solari (a) Parke, B.*, lays down the doctrine, “where money is paid to another under the influence of a mistake, that is, upon the supposition

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(a) 9 M. & W. 54.

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that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." That case is stronger than the present, because there the plaintiff had at one time known, though he had forgotten the fact which disentitled the defendant to the money. [Martin, B.—The party who received the money must not be put in a worse position than if the money had not been paid; *Cocks v. Masterman* (*a*). Here the defendant was induced not to proceed against her debtor, Carter, though she was in a condition to have sued him on the bond which the Bank had obtained from her. Pollock, C. B.—If the defendant has received the money, and divided it amongst the creditors, it would be contrary to justice that it should be recovered back. Bramwell, B.—The Bank got the title that the defendant had.] *Milnes v. Duncan* (*b*) shews that if money is paid under a mistake of the real facts, it is recoverable back if there is no laches. In *Lucas v. Worswick* (*c*) the doctrine was carried still further. If a person sells a bill, he impliedly warrants that it is of the kind and description it purports to be, and the price may be recovered back if the bill is a forgery, or is not properly stamped: *Gompertz v. Bartlett* (*d*); *Young v. Cole* (*e*). [Martin, B.—*Gompertz v. Bartlett* seems contrary to *Lamert v. Heath* (*f*).] There is a distinction in the case where there is a regular conveyance in which there may be covenants for title; *Cripps v. Reade* (*g*). In *Cox v. Prentice* (*h*), money paid under a mistake as to the quality of a bar of silver sold by the defendant to the plaintiff, was held to be recoverable. *Robinson v. Ander-*

(*a*) 9 B. & C. 902.

(*e*) 3 Bing. N. C. 724.

(*b*) 6 B. & C. 671, cited 2 Smith's

(*f*) 15 M. & W. 486.

Leading Cases, 242.

(*g*) 6 T. R. 606.

(*c*) 1 Moo. & Rob. 293.

(*h*) 4 M. & Sel. 344.

(*d*) 2 Ell. & Bl. 849.

*ton (a)* is to the same effect. [*Martin*, B.—*Cox v. Prentice* reversed the rule of law, which is, *caveat emptor*. We recently recognised that principle in this Court in the case of *Morley v. Attenborough (b.)*.] In *Harris v. Loyd (c.)*, which was cited on moving for this rule, the plaintiffs were simply volunteers in paying the money to the sheriff. [*Bramwell*, B.—Here the Bank were volunteers: in *Kelly v. Solari*, if the facts as to which there was a mistake had been true, the defendant would have been in a position to compel the plaintiff to pay the money.]

*M. Smith* and *Gray*, in support of the rule.—The defendant applied to Carter for the money due to her from him. In consequence of arrangements between Carter and the Bank, the Bank chose to pay Carter's debt. If the defendant were to sue Carter he could plead payment. [*Bramwell*, B.—Where there has been a payment which turns out to be void, as having been a fraudulent preference, the original debt revives.] If the bond is not extinguished, it is in force for the benefit of the Bank. In *Bree v. Holbeck (d.)*, an administrator having found among the papers of the intestate a deed which purported to be a mortgage, thinking it to be genuine, asked for the mortgage money. He received it, and executed an assignment covenanting merely for his own acts. There was no covenant for title. The mortgage turning out to be a forgery, and it was held that the party who paid the money could not recover it back. In *Cripps v. Reade (e.)*, Lord Kenyon, recognising *Bree v. Holbeck (d.)*, drew a distinction between the two cases, on the ground that in the one then before the Court there had been no conveyance. Here there was a conveyance with covenants for title by Carter. [*Martin*, B.—The case comes to this; if I apply to a man for payment of a debt,

(a) Peake, 129.

(d) 2 Dougl. 655.

(b) 3 Exch. 500.

(e) 6 T. R. 606.

(c) 5 M. & W. 432.

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and some third person pays me, can he recover back the money because he has paid it under some misapprehension?]

POLLOCK, C. B.—We are all of opinion that the rule must be absolute. The case, when examined, is quite clear, and the facts lie in a narrow compass. The defendant's testator, Short, had a claim on Carter,—a bond and a security on property which Carter afterwards mortgaged to the Bank. The defendant, who was the executrix of Short, applied to Carter for payment. He referred her to the Bank, who, conceiving that the defendant had a good equitable charge, paid the debt, as they reasonably might do, to get rid of the charge affecting their interest. In consequence of the discovery of a later will of Edwin Carter, it turned out that the defendant had no title. The Bank had paid the money in one sense without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake. Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was, in fact, paid by the Bank, as the agents of Carter.

PLATT, B.—I am of the same opinion. The action for money had and received lies only for money which the defendant ought to refund *ex aequo et bono*. Was there any obligation here to refund? There was a debt due to Short, secured by a bond and a supposed equitable charge by way of collateral security. The property on which Short had the charge was conveyed by Carter to the Bank.

Short having died, the defendant, his executrix, applied to George Carter for payment of the debt due to her husband, the testator. Carter referred her to the Bank, who paid the debt, and the bond was satisfied. The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it,

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BRAMWELL, B.—My brother *Martin*, before he left the Court, desired me to say that he was of the same opinion, and so am I. In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. The mistake of fact was, that the Bank thought that they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter. In *Pritchard v. Hitchcock* (a) a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not shew that the plaintiffs can maintain this action, and I am of opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.

(a) 6 M. & G. 151.

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## MUNCEY v. DENNIS.

A tenant held under a lease which contained a covenant that he should cultivate the farm according to the custom of the country, and should with the last wheat crop lay down the same with 20 lbs. weight of good clover seed per acre, and continue the same so laid down for feeding, not to exceed three grounds belonging to the farm; and should during all the term consume with stock in the farm all the hay, straw and clover grown thereon; which manure should be used on the said farm; and that the lessor and his assignees would allow the lessee to occupy half the rooms in the house, and the barn, yards and granary, until Midsummer Day after the expiration of the said term, if necessary, to finish the cropping of the lessee grown on the premises thereby demised. Under the custom of the country the tenant would have been entitled to be paid for the straw and manure on leaving.

*Held:* the covenant, containing no provisions as to straw unconsumed on quitting, was not inconsistent with the custom of the country, and therefore that the plaintiff was entitled to be paid for his straw.

**D**ECLARATION for monies payable in respect of the plaintiff's relinquishing and giving up a certain farm, together with the use and benefit of divers quantities of manure, muck, and dung upon them, expended and bestowed thereon by the plaintiff; and for seed used and sown, and for work done by the plaintiff and his servants in ploughing, harrowing, manuring, &c. by the plaintiffs relinquished and given up in favour of the defendant, and by the defendant had, used and enjoyed; and for money payable for hay, straw, and manure sold and delivered, and on accounts stated.—Plea.—Never indebted.

The cause was tried before the under-sheriff of Cambridgeshire, when the following facts appeared.—The action was brought to recover the sum of 13*l.* 10*s.* claimed by the plaintiff as payable by the defendant, the incoming tenant, to the plaintiff as outgoing tenant, according to the custom of the country, for the value of straw left by the plaintiff at Michaelmas, 1854, on quitting the occupation of two pieces of land leased by one Flanders to the plaintiff by indenture dated January, 1848. The lease contained covenants by the plaintiff that he would cultivate the farm according to the custom of the country; and that “he should with the last wheat crop lay down the same with twenty pounds weight of good clover seed per acre, and continue the same so laid down for feeding,

not to exceed three grounds belonging to the farm; and should and would, during all the said term, consume with stock on the said farm, all the hay, straw, and clover grown thereon, which manure should be used on the said farm: and that the said Smith Flanders, his heirs and assigns, should and would allow the said Ellis Muncey, to occupy half the rooms in the house, and the barn yards and granary, until Midsummer Day after the expiration of the said term if necessary, to end the cropping of the said Ellis Muncey grown on the said premises thereby demised."

The defendant objected, that evidence of the custom of the country was inadmissible, but the under sheriff decided that he would admit it. The custom of the country was proved to be,—that when an incoming tenant pays for straw and manure, he is paid when he goes out: when the dung belongs to the landlord, the incoming tenant pays for the thrashing, dressing, and carting to market, and has for that the straw, chaff and colder; but when the dung belongs to the tenant, then the straw is valued by the ton at a consuming price.—On taking possession of the farm, the plaintiff had paid for the hay, straw, and manure, according to the former mode of valuation. On the plaintiff leaving the farm, the straw was valued by a person named by the defendant, who admitted that he agreed to the valuation, "if it was lawful." The term "ending the cropping," was explained by a witness for the plaintiff, to mean the harvesting and thrashing out the corn, and so turning it into straw, but not consuming the straw. The jury found a verdict for the plaintiff for the amount claimed.

*Keane* had obtained a rule, calling on the plaintiff to shew cause why a new trial should not be had, on the ground that the lease excluded the custom of the country.

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*Couch* shewed cause, in last Easter Term, (May 7) (a). The custom of the country prevails where it is not inconsistent with the terms of the lease. This lease is altogether silent as to the terms of quitting. The only stipulation which can be supposed to exclude the custom of the country is that by which the tenant is bound to consume all the hay and straw with stock on the farm. In *Holding v. Pigott* (b) it was held, that when the lease contains no stipulations as to the mode of quitting, the rights of the landlord may be governed by the terms of the agreement during the tenancy, and by the custom of the country immediately afterwards. The proper construction of the lease is, that no hay shall be taken off during the term. It is not intended to deprive the tenant of the power of selling hay left on the farm. *Gough v. Howard* (c), shews, that by the general rules of husbandry a tenant is entitled to sell hay off his farm. The special stipulation was introduced to restrict that particular liberty. But the defendant seeks to extend its operation, and says, that after the expiration of the term, the tenant was bound to keep stock, and turn this straw into manure. There is no reason why he should not sell it to the incoming tenant, subject to the obligation to consume it on the farm.—He referred to *Massey v. Goodall* (d).

*Keane*, in support of his rule.—The tenant was bound to consume all the hay and straw during the holding. He was to have half the rooms, and all the yards and granaries for nine months after the expiration of the term, to enable him to consume everything. *Holding v. Pigott* (b) related, not to manure, but to an away-going crop. [Bramwell, B.,

(a) Before Pollock, C. B., Alderson, B., Martin, B., and Bramwell, B.

(b) 7 Bing. 465.  
 (c) Peake's Add. Ca. 197.  
 (d) 17 Q. B. 310.

referred to *Faviell v. Gaskoin* (*a*.)] Here the tenant was not entitled to the straw, he ought to have consumed it. In *Massey v. Goodall* (*b*), a stipulation not to sell straw or manure produced upon the farm, was held to be broken by a sale after the expiration of the tenancy.

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The judgment of the Court was now delivered by

POLLOCK, C. B.—We are of opinion that this rule should be discharged. The action was brought to recover the value of some straw left by the plaintiff on his quitting a farm of which the defendant was the succeeding occupier. The defendant admitted he was liable, if the plaintiff was entitled to the straw or its value from any person. The custom of the country proved was, that an outgoing tenant who, on coming in, had paid for straw, was entitled to be paid for it on going out. The plaintiff had so paid on coming in. But it was contended by the defendant, that this custom was inconsistent with the terms of the lease under which the plaintiff held; and no doubt, if it was, the plaintiff could not avail himself of it, and would not be entitled to recover, as it was admitted he had no greater right against the defendant than he would have had against his landlord. Now the lease was for seven years from October 11, 1847, and contained (among others) a clause for cultivating, according to the custom of the country, and the following: “And it is stipulated that the said Muncey shall, with the last wheat crop, lay down the same with 20 lbs. weight of good clover seed per acre, and continue the same so laid down for feeding, not to exceed three grounds belonging to the farm; *and shall and will, during all the said term, consume with stock on the said*

(*a*) 7 Exch. 273.

(*b*) 17 Q. B. 310.

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*farm all the hay, straw and clover grown thereon, which manure shall be used on the said farm.* And shall, in the last year of the term, leave not less than fourteen acres of land, summer fallowed, manured with a full quantity of manure, and sown in good time for sheep feed. There was a clause that the landlord should allow "the tenant to occupy half the rooms in the house, and the barn, yards and granary, until Midsummer Day after the expiration of the term (if necessary) to end the cropping grown on the premises thereby demised."

The defendant's contention was, that by the lease the plaintiff was bound to consume *all* the straw and not to leave any, and that, therefore, he could have no right to be paid for any which he did leave. But we think this is not the meaning of the clause. The meaning is that no straw shall be removed off the premises. If the defendant's construction is right, the tenant breaks his covenant by leaving any straw, and, therefore, as the right of onstand does not apply to the consumption of the straw, must keep his straw and his cattle so nicely adjusted that the last stalk is finished by the 11th October, 1854, including that produced at the previous harvest, or he will be liable to an action, although it is certain that the consuming of the straw is a benefit to the consumer, and that it would be a gain to the succeeding tenant to have the straw left gratis for him rather than the manure, its produce.

Further the clause provides, that the manure produced thereby shall be used on the farm, certainly meaning during the term. These considerations shew to us that the clause in question relates, as it says, to what is to be done "during the term," and not what is to be done on its termination, and on the tenant's quitting; that its object is not the consumption of the straw but its non-removal, and that it may well be read as though it went on to say, "and if, at

the expiration of the term, there shall be any straw not consumed the tenant shall be paid for the same. No case is precisely in point, but the principles of our decision are to be found in *Holding v. Pigott* (a).

In the result we consider this lease as providing for what shall be done during the term; that it provides that during the term the tenant shall not remove straw from the premises, but consume it on them, and use the manure on them; that it makes no provision for what shall be done as to unconsumed straw on quitting; that (but for any custom) that straw would be the tenant's property, and that by the custom he is bound to leave it and is entitled to be paid for it.

Rule discharged.

(a) 7 Bing. 465.

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SMITH v. REYNOLDS.

May 31.

THE declaration set forth a policy of assurance on a ship called the James Russell, which was in the usual form of marine policies with the exception of the following clause—“ And it was declared that the said insurance was on profit on cotton, say 150 bales, marked as therein mentioned, said profits valued at 350*l*, and the parties did agree that in case of loss or accident the said policy should be considered a sufficient proof of interest, and said policy warranted free from average and without benefit of salvage, that is, should the vessel, from any cause whatever, be unable to bring in her cargo, then a total loss was to be paid.—Averments: that the defendant underwrote the said policy for 150*l*: that the cottons marked as aforesaid were shipped at Bombay on board the said ship for the said voyage, and that the plaintiff, at the time of making the said policy and afterwards until and at the time of the loss hereinafter mentioned, was interested in the said cottons, and was

An insurance on profits on goods laden on board a ship is an insurance on goods within 19 Geo. 2, c. 37, s. 1. And therefore an insurance on profits containing clauses prohibited by that statute is illegal.

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interested in the profits of the said cottons to a large amount, to wit the amount of all the monies by him ever insured or caused to be insured on the said profits: that the said ship was wrecked and stranded and was unable to bring on and did not bring on her cargo, and the said profit on the said cotton became and was wholly lost to the plaintiff within the meaning of the said policy, and a total loss thereon became and was payable.

Plea.—That the ship in the said policy mentioned was, at and before the time of the making the policy and during the whole of the voyage and adventure, and still is a British ship belonging to subjects of her Majesty.

Demurrer and rejoinder thereon.

Milward (with whom was *Edward James*), in support of the demurrer (*a*).—The defence set up is, that this is a wager policy within the prohibition in the 19 Geo. 2, c. 37, s. 1. That is a penal enactment which the Court will construe strictly. The words are,—That no assurance shall be made “on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandizes or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof or (*b*) interest than the policy, or by way of gaming and wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes.” The question is, whether profits are “goods, merchandizes, or effects.” The act points to an insurance of a substantive matter in existence, viz. something to be laden on board the ship.

Blackburn, in support of the plea.—That which is sought

(*a*) Easter Term, April 28. Before *Pollock*, C. B., *Alderson*, B., and *Bramwell*, B.

(*b*) Sic.

to be secured by the policy is the profit. The event assured is the arrival of the ship and goods safely. The policy is a gaming policy; it is without benefit of salvage. Profits are insurable as a part of the goods from which the profit is to arise. In *Stockdale v. Dunlop* (*a*) *Parke*, B., explained that profits may be insured, because they form an additional part of the value of the goods in which the party has already an interest. To the same effect is *The Corporation of the Royal Exchange Assurance v. McSwiney* (*b*). These profits are part of the goods, or nothing; if nothing, then the policy is a mere wagering policy.

Milward, in reply.—The declaration contains an averment that the plaintiff is interested in the profits.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case we are of opinion that the defendant is entitled to judgment. The policy contains clauses expressly prohibited by the 19 Geo. 2, c. 37, s. 1, and the only question is, whether the insurance is an “insurance on a ship or on goods or effects laden on board a ship.” The insurance is “on profit on cotton, say 150 bales marked as therein mentioned, said profits valued at 350*l*, and the parties did agree that in case of loss or accident the said policy should be considered as sufficient proof of interest, and said policy warranted free from average and without benefit of salvage, that is, should the vessel, from any cause whatever, be unable to bring on her cargo, then a total loss was to be paid.” Now it is said that this, being an insurance on profits, is not within the statute. But what is an insurance? It is a contract by

- (*a*) 6 M. & W. 224, see p. 232.
(*b*) 14 Q. B. 634, see p. 661.

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which the insurer undertakes on the happening of certain events to pay the insured a sum of money or damages. Where a house is insured from fire, the insurer is to pay if the house is damaged by fire. If a person insured his rent during the time it would require to rebuild a house if burned down, that would be an insurance on the house. A marine insurance on goods is a contract to pay money if those goods are damaged or destroyed by perils insured against affecting them or the ship, so as to cause their damage or loss. Here the contract is a contract to pay money if the goods are lost or damaged, or do not arrive by reason of the perils insured against: it is therefore an insurance on goods. If the policy had been on the cost price of goods valued at 900*l.*, and on the profits on such goods valued at 100*l.*, it would be impossible to say, that part was an insurance on goods and part not, or that the effect was not the same as though the policy had been on goods valued at 1000*l.* The expressions, "insurance on" or "insurance against," are not strictly correct, unless considered as elliptical. Popularly speaking, the thing to which the damage is apprehended is said to be the thing insured, or that on which the insurance is; and the cause of damage apprehended is said to be the thing insured against. But, strictly, the matter insured is, that the assured shall sustain no damage; the thing insured against is, that the event shall do no damage to the assured because he shall be compensated. Here the thing to which the damage was apprehended was the goods, and the cause of damage apprehended was the perils enumerated affecting them or the ship. If the goods are uninjured, no damage was apprehended to the profits. This insurance, therefore, is within the statute, and the defendant is entitled to judgment.

Judgment for defendant.

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ANSTEE v. NELMS.

June 7.

EJECTMENT to recover possession of a piece of land called Wick's Ground or Little Toghill, in the parish of Wick and Abson, in the county of Gloucester.

At the trial, before *Cresswell*, J., at the last Spring Assizes for the county of Gloucester, it appeared that the plaintiff claimed this piece of land as devisee of Mary Mannings, who, by her will dated in 1841, devised all her real property whatsoever to the plaintiff. The property in question had formerly been in the possession of Nicholas Mannings, the father of Mary Mannings. In 1804 Nicholas Mannings made his will, containing the following devise:—

“Also I give, devise and bequeath to Richard Cook, John Cook and John Evans and their heirs, all and singular my messuages, lands, tenements and hereditaments in the parish of Doynton, in the county of Gloucester, subject and liable and charged as aforesaid, to, for, and upon the several uses, ends, intents and purposes hereinafter limited and declared of and concerning the same, that is to say, to the use of my daughter Mary Mannings and her assigns for and during the term of her natural life, if she shall so long continue single and unmarried, but no longer.”

Nicholas Mannings died in 1804, leaving Samuel Mannings, his son and heir-at-law, surviving him. On the death of

By will dated in 1804, S. M. devised all his lands in Doynton to his daughter Mary for life, with remainder over. The testator was possessed of a farm in the parish of Doynton. One piece of land, part of this farm, and surrounded by land in Doynton, was in fact in the parish of Wick and Abson; but in 1804 was generally reputed to be in Doynton.

Held, that it passed under the will.

The tenants of the piece of land in question, proved that they had been rated in Wick and Abson since 1824. In answer to this, the defendants put in the rate books of the parish of

Wick and Abson from 1780 to 1824, to shew that the names of the occupiers of this piece of land did not appear in the rate books of that parish prior to 1824. *Held*, that the rate books from 1780 to 1824 were receivable to rebut the presumption arising from the proof of the rating since 1824.

Sembly, per *Pollock*, C. B., and *Martin*, B., that if a person to whom a particular estate is given by will for his life takes possession, and is allowed to keep as part of that estate something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman.

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Nicholas, Mary Mannings took possession of the lands in Doynton, and also of the piece of land in question. She farmed it herself for two years, and then let it to her brother, Samuel Mannings, the heir-at-law, for three years. She continued to receive the rent of the land till her death in 1843. Evidence was adduced to shew that she had at one time talked of selling it. Nicholas Mannings, the grandson of Nicholas Mannings the elder, being the person entitled as next in remainder under the limitations in his will, entered on the death of Mary Mannings in 1843. The piece of land, though nearly surrounded by land in Doynton was, in fact, in the parish of Wick and Abson, and had been rated in that parish since 1824. The plaintiff contended that the property in question not being in fact in Doynton, it did not pass to Mary Mannings for life under the will of Nicholas Mannings, but that by twenty years possession, and by virtue of the statute for the limitation of actions relating to real property (*a*), she had acquired an estate in fee, and that such estate passed, by her will, to the plaintiff. The defendant's witnesses proved that Wick's Ground was formerly considered to be in Doynton. The rate-books of Wick and Abson from 1780 to 1823 were produced, to shew that the tenants of Wick's Ground were not, during that period, rated in the parish of Wick and Abson. The plaintiff's counsel objected to the reception of these books, but the learned Judge received them as evidence. The questions left to the jury were, first, whether, in 1804, Wick's Ground was reputed to be in the parish of Doynton; secondly, whether Mary Mannings took possession and held it with the rest of the land as having been left to her by her father's will. The jury found that Wick's Ground was in fact in Wick and Abson, but that in 1804

(*a*) See 3 & 4 Wm. 4, c. 27, ss. 2, 3, 15.

it was reputed to be in Doynton, and that Mary Mannings took it under the will with the other property. The learned Judge directed a verdict to be entered for the defendant, with leave to the plaintiff to move to enter the verdict for her.

Huddleston, in Easter Term, obtained a rule to shew cause why the verdict should not be entered for the plaintiff, on the ground that the land in question did not pass under Nicholas Mannings' will, and that the plaintiff took it under Mary Mannings' will; or why a new trial should not be had on the ground that the learned Judge misdirected the jury in telling them to consider whether the land was reputed to be in Doynton; and that the rate-books from 1780 to 1823 ought not to have been received in evidence.

Whitmore and *Phipson* now shewed cause.—This is a mere falsa demonstratio. The jury found that the land was reputed to be in Doynton, and that the testator devised it by that description. [Bramwell, B.—There were lands in Doynton which satisfied the terms of the devise. The case of *Doe d. Oxenden v. Chichester* (a) would seem to shew that where that is the case, other lands which do not answer the description cannot be deemed to be included.] The case of *Doe d. Chevalier v. Huthwaite* (b) shews that where there is a mistake in the name and description of the person intended to be benefited, evidence of the state of the testator's family is admissible, and the question is not whether the donee is truly described, but how the testator knew and would have described him. In *Doe d. Gord v. Needs* (c) there were two persons, each answering the description of George Gord, the son of Gord, named in

(a) 4 Dow. 65. See *Doe dem. v. Pain*, 4 Hare, 251.
Gore v. Langton, 2 B. & Ad. 680. (c) 2 M. & W. 129. See also
(b) 3 B. & Ald. 632. See *Lee v. Lee v. Pain*, 4 Hare, 251.

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the will, and evidence of the testator's declarations was held admissible to shew which of the two was meant.

As to the second point: Mary Mannings occupied for life, and the jury found that she took this piece of ground with the rest of the land under the will of Nicholas Mannings. After her death, it was for the first time alleged that her possession was tortious. A tenant for life occupying in a known character as devisee, cannot create a new right in himself by alleging that he is holding adversely. [Martin, B.—It is like the case of a tenant who takes in a piece of land from the waste and treats it as part of his farm (a). If a person takes under a will and is allowed to hold, and continues to hold in that character, I think that he would be estopped from saying that he did not so take the property]. If that is so, certainly the estoppel would be in accordance with right and justice.

Then, as to the rate-books: they were put in to shew that this land was not rated in Wick and Abson till 1824. They were admissible to contradict the presumption arising from the plaintiff's evidence that this land had been rated in Wick since 1824.

Huddleston and *Matthews*, in support of the rule.—The testator possessed property which fully answered the description in the devise; and this piece of land which does not answer the description did not pass. [Pollock, C. B.—Suppose the testator had bequeathed "all his pictures by Rubens," would not the question be, not whether Rubens painted the pictures, but whether the testator would have so described them at the time of the bequest? Bramwell, B.—Suppose he bequeathed all his "Scott's novels," if the jury found that "Castle Dangerous," though reputed to be, was not in fact written by Sir Walter Scott, could it be said

(a) *Kingsmill v. Millard*, 11 Exch. 313.

that "Castle Dangerous" would not pass?] The illustrations put by the Court assume that the words, "in the parish of" Doynton have no strict and primary meaning. But they have a plain well known meaning, and evidence is not admissible to give them another sense (a). [Bramwell, B.—What is their primary signification? Is it actually in the parish, or in the parish as reputed?] The reputation must be general and clearly proved. No mistaken notion of the testator on the subject can affect the question. In *Stone v. Greening* (b) it was held, that under a devise of freehold messuages, where the testator had freeholds and leaseholds, leaseholds would not pass, though the lands were interspersed and held as one farm and the testator had always treated the whole as freehold. There was nothing to establish an estoppel against Mary Mannings. The utmost that could be said was, that her possession was not adverse at the time of her entry: it became so when she proposed to sell. But even if the possession was not adverse, the 3 & 4 W. 4, c. 27, makes this question of adverse possession immaterial, no action having been brought to recover possession within five years after the passing of that Act (c).

Then as to the evidence.—The persons who made the rate-books were not shewn to have been dead, nor were the books proved to have been made in the course of business; they were mere lists of names. It did not appear in respect of what property the parties were rated. The books proved nothing, were immaterial, and tended to mislead. That Nicholas and Mary Mannings were not rated does not shew that they were not rateable. There-

(a) They referred to Wigram on the application of extrinsic evidence to the interpretation of Wills, Prop. 1. See also *Shore v. Wilson*, 9 Cl. & F. 558, 565. (b) 13 Simons, 390. (c) See section 15. They referred to *Doe dem. Parker v. Gregory*, 2 A. & E. 14; S. C. 4 N. & M. 308.

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fore these books were not evidence on the question of rating. They were not shewn to have been acted upon by the parish; but were mere statements by the churchwardens who made them. The only rate-book which could have any bearing on the subject was that of 1804: the reputation as to the parochiality of the piece of land in 1820 was wholly immaterial.

POLLOCK, C. B.—We are all of opinion that this rule must be discharged. Two points were made upon the argument. First, it was said that this piece of land was not in Doynton, and that nothing passed under the devise except the testator's estate in Doynton. The question really is, whether this piece of land was parcel or not parcel of the thing devised. If it was reputed to be in Doynton, then the testator meant to give it. He did not mean, that if on investigation this piece of land which he supposed to be in Doynton should turn out to be in Wick and Abson, it should not pass. He never intended that the question should depend on the parochiality of the subject-matter of the devise. If, in common with others, he thought that the land was in Doynton, it passed by that description in his will. It is said that there was no evidence of general reputation on this point. The rule was not moved for on the ground that the verdict was against evidence; but if it were open to the plaintiff to raise that question, I should say that there was abundant evidence. Then it is urged, that the Judge should have explained to the jury what general reputation on such a subject is. But the Judge is not bound to enunciate an elaborate treatise on the points that arise. A jury can understand very well what is meant by reputation. I quite agree with the suggestion thrown out on the argument, that the very facts of Mary Mannings taking this property, and being permitted to keep it, under

the will, are evidence that it was considered to be in Doynton, and that it was generally reputed to be so. I have already intimated my opinion, that such a general reputation is sufficient to make it pass with the rest of the property, by the general description of land in Doynton. I think so, notwithstanding that there is other property in Doynton which strictly answers the description, and that the jury have found that this property was, in fact, in Wick. By the gift of land "in a parish," a testator means to pass that which he understands,—that which is generally understood, to be in the parish. A subsequent discovery of the true parochiality will make no difference; if it were otherwise, a will would mean one thing in 1804, and another in 1855.

As to the second point, I think that Mary Mannings took under the will, and held the property till her death, under the will.

MARTIN, B.—I am of the same opinion. Mary Mannings took possession of this piece of land under the devise as land in Doynton. She occupied it all her life. The testator, by his will made in 1804, had devised to R. Cook, J. Cook, and Evans, to the use of Mary Mannings for her life, messuages and land in Doynton. The question is, what did the testator mean by land in Doynton? The learned Judge who presided at the trial ruled that he meant that which in 1804 was deemed to be in Doynton. It is impossible to conceive that he meant the construction to depend on a discovery which did not take place till twenty years after the date of the will. The case falls within the rule stated in Sir J. Wigram's fifth proposition (*a*):—"For the purpose of determining the object of the testator's bounty or

(*a*) Wigram on the application of extrinsic evidence to the interpretation of Wills, Prop. 5, p. 51.

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the subject of disposition, a Court may inquire into any material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator." For the purpose of ascertaining what the testator here meant, the Court may,—or I should rather say must,—inquire into every circumstance connected with the land, which may enable them to put the right interpretation upon the testator's words. It is said, that there is no evidence that the reputation was known to the parties at the date of the will. There was the strongest evidence of it. Mary Mannings immediately took possession, and was allowed to keep possession of the land as being in Doynton. Her entry must be considered as having been lawful, if the facts are not inconsistent with that construction. Further, my impression is, (if it were necessary to decide the point) that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give to his heir a right against the remainderman. I think that no Court would so construe it.

Then as to the evidence. It is clear that the rate-books were properly received. The tenants proved that they paid rates in Wick and Abson since 1824. The rate-books for a series of years antecedent to that time were produced, and from them it appeared that the names of the Mannings who had been in possession of this piece of land did not appear in the rate-books before 1824. I am therefore of opinion that this rule must be discharged.

BRAMWELL, B.—I think that the rate-books were clearly

admissible in evidence. On the second point I give no opinion; on the first point I think it clear that the plaintiff is entitled to the verdict. I agree with my brother *Martin* that a Court is bound to inquire into every material fact relating to the property claimed as the subject of disposition. The fact turns out to be, that when the testator made his will this property was commonly reputed to be in Doynton. What then is the primary signification of the words "in the parish of" Doynton—"which shall be proved to be in Doynton"—or "commonly reputed to be in Doynton?" I hold the latter to be the natural meaning of the words. The land may have been reputed to be in Doynton for five hundred years; but afterwards, on an inquiry being instituted, on reference to Domesday book or some other ancient or forgotten record, it may turn out to be in another parish. Suppose a man were to devise an estate which he always supposed to be conterminous with a particular parish, if he devised it by the name and description by which he knew it, I think the case would be similar to those where a man has devised to another by a wrong name. The defendant appears to me to be entitled to this piece of land, if the will is construed according to the terms of Sir J. Wigram's first proposition, namely, "that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation" (a).

Rule discharged.

(a) *Wigram on the application of extrinsic evidence to the interpretation of Wills*, Prop. 1, p. 15.

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June 9.

RACKHAM v. MARRIOTT.

In answer to an application for payment of a debt the debtor wrote as follows:—
 "I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of paying and must crave a continuance of your indulgence.

My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance."

Held, no sufficient acknowledgment or promise to take the case out of the Statute of Limitations.

DEBT for money had and received, money lent, and on accounts stated.—Plea (*inter alia*): The Statute of Limitations.

At the trial, before *Willes*, J., at the Liverpool Spring Assizes, the plaintiff's counsel, in order to sustain the issue on the Statute of Limitations, put in the following letter, written in answer to one, calling the attention of the defendant to the plaintiff's claim, and stating that if something was not done the debt would be barred by the Statute of Limitations.—

Liverpool, Wednesday, Jan. 26, 1853.

Dear Sir,—Your note of the 20th I received on Monday, having been out of town a few days, or I should have replied to it before. I beg to say, that I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt alluded to in your note, but I have not the means of paying it and must crave a continuance of your indulgence. My situation as a salaried clerk does not afford me the means of laying by a shilling, but in the course of time, if I continue in my present employment, I may reap the benefit of my services in an augmentation of my salary that may enable me to propose some satisfactory arrangement to you. I am much obliged to you for your forbearance, and I am sorry it is not in my power to correspond to your kindness, but I would rather tell you the truth than deceive you by false promises.

Believe me, dear sir, yours truly,

F. MARRIOTT.

At the close of the plaintiff's case, the defendant's counsel objected that the letter did not amount to an acknowledg-

ment or promise sufficient to bar the defence under the statute. The learned Judge thought that the letter amounted to a promise to pay when of ability; and told the jury that if they were satisfied by the evidence that the defendant was of ability to pay at the time of writing the letter, or had been so at any time since, the defendant was liable. The jury having found a verdict for the plaintiff,

Brett, in Easter Term, obtained a rule nisi for a new trial on the ground of misdirection.

Milward shewed cause (a).—The defendant says, “I beg to say that I do not wish to avail myself of the Statute of Limitations.” That alone constitutes a promise. *Gardner v. MacMahon* (b). An acknowledgment of the existence of the debt is enough. This letter goes further, it is an acknowledgment coupled with a representation that the right of action shall be preserved; and the plaintiff was induced to act on the faith of that representation. The case resembles *Bird v. Gammon* (c), the ground of decision in which was, that the letter contained an admission that at all events the debt must be ultimately paid. In *Hart v. Prendergast* (d), there was nothing more than the expression of a hope by the defendant that he should be able to pay part in a week. The same observation applies to *Smith v. Thorne* (e).

Brett, in support of the rule.—The plaintiff must either prove a promise to pay on request, or an unconditional acknowledgment from which a promise to pay on request can be implied, or a conditional promise, and that by the fulfilment of the condition the promise has become absolute. Here there is an absolute promise.

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| (a) May 27. Before <i>Pollock</i> , | (c) 3 Bing. N. C. 883. |
| C. B., and <i>Martin</i> , B. | (d) 14 M. & W. 741. |
| (b) 3 Q. B. 561. | (e) 18 Q. B. 134. |

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*Hart v. Prendergast* (*a*) shews that the whole instrument must be looked at, and that an isolated portion of such a document cannot be extracted and construed as a promise, when other parts of the document shew that it was not meant to have that effect. According to the case of *Gardner v. MacMahon* (*b*), the document might have been a sufficient acknowledgment if it had stopped at the expression of an intention by the defendant not to avail himself of the Statute of Limitations. But the concluding part qualifies any acknowledgment which might otherwise have been implied from these words. *Smith v. Thorne* (*c*) is in point.

*Cur. adv. vult.*

POLLOCK, C. B., now said.—We are of opinion that the rule must be absolute. The question is, whether the defendant is deprived of the right to plead the Statute of Limitations by the letter of the 28th of January, 1853.—(His Lordship read the letter).—It may be that a promise made by a debtor, that he will not avail himself of the Statute of Limitations, may, if it stands by itself, amount to a promise to pay the debt, and render it unnecessary for the creditor to institute proceedings to prevent the statute from operating. I am not prepared to say that it ought to receive that construction. But it is impossible to read this letter as a promise by the defendant not to avail himself of the statute. It is the mere expression of a wish not to do so. The defendant says, “I have not the means of settling the debt and must crave indulgence.” Then he refers to his situation as making it impossible that he should lay by a shilling. He says, that he expects that an increase of salary will enable him, not to pay the debt,

(*a*) 14 M. & W. 741.

(*b*) 3 Q. B. 561.

(*c*) 18 Q. B. 134.

but to propose some satisfactory arrangements with the plaintiff; that is, some arrangement which may be for a payment in part, or a payment by instalments at distant periods. Instead of containing any definite promise to pay at a future period when he has the means, or under any particular circumstances, he refers to possible future prosperity as being likely to enable him to make a proposition which he hopes will prove satisfactory. We are of opinion that this letter does not amount to any promise of any kind, absolute or conditional, and therefore the rule must be absolute.

Rule absolute.

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GRIFFITHS v. RIGBY and Another.

June 10.

**C**OVENANT.—The declaration stated that by indenture dated, &c., the plaintiff demised to the defendant the mines, veins, seams and beds of coal, cannel coal and slack which could, should or might be opened, found or discovered during the term under certain pieces of land in the indenture mentioned, together with power to search, raise and get up all the coals, cannel or slack, and to use all lawful means for finding and working the same, and for the avoidance and carrying away of water; and also full liberty during the term, to take and carry away, with horses &c., all the coal to be wrought or gotten from and out of the

A demise of coal mines for 30 years, yielding 400*l.* for every acre of coal, &c., by annual payments of not less than 200*l.*: provided that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out and gotten at any time prior to the

expiration of the term, and that the said coal so fairly wrought should have been wholly paid for, then that the annual payment of 200*l.* should cease and be no longer payable.

*Held*, that the question whether the coal could be fairly wrought did not depend upon whether it could be worked at a profit or not, or whether any such coal as that demised was worth working, but assuming that coal of the same description as that demised could be properly worked, whether, according to the usage of miners, the coal in question could be worked without extraordinary difficulty or expense.

The learned Judge at the trial told the jury that he would not give them any explanation as to what was meant by "fairly" wrought, and that they were better judges of the meaning of the phrase than he was. He told them what he thought it meant.

*Held*, that this direction was insufficient.

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said lands &c., to hold the said mine &c., and the privileges &c. to the defendants from the day of the date of the said indenture for the term of thirty years; yielding and paying to the plaintiff after the rate of 300*l*. for every statute acre of all the main coal, and 100*l*. for every statute acre of all the hollin, brassy and rough coal, which should, during the term, be found and obtained under the said premises by annual payments of not less than 150*l*. for the main coal, and 50*l*. for the brassy, hollin and rough coal, making together the sum of 200*l*. on the 27th day of January in each year: provided that in case the whole of the said coals under the said lands, so far as the same could be fairly wrought, should have been worked out and gotten at any time prior to the expiration of the said term of thirty years; and that the said coal so fairly wrought should have been wholly paid for after the rate of 400*l*. for every statute acre thereof, then and from thenceforth the annual payment of 200*l*. should cease and be no longer payable; but if it should happen that all the said coal, so far as it might be fairly wrought as aforesaid, should not be worked out and gotten within the term, then that the defendants should pay to the plaintiff the balance which should be due to him at the end of the term for all such coal after the rate of 400*l*. for every statute acre as aforesaid, that is to say after the rate of 300*l*. for every statute acre of the main coal, and 100*l*. for every statute acre of the hollin, brassy and rough coal which might then remain ungotten through the neglect or default of the defendants; and the defendants covenanted with the plaintiff that they would pay the sum of 200*l*. in each year during the term for, and on account of, the said sum of 400*l*. reserved as aforesaid, for every statute acre of the said coal so distinguished as aforesaid, unless the same should be sooner fairly worked out and wholly paid for; and that the defendants would work the mines in a proper

and effectual manner.—Breach: that the defendants did not continue to work the mines in a proper and effectual manner, but therein made default; and that the whole of the coal under the said lands so far as the same could be fairly wrought had not been fairly worked out.

Pleas, (inter alia).—First, that the defendants continued to work the mines in a proper and effectual manner according to the true meaning of the said indenture: Secondly, that they continued to work and carry on the mines in a proper and effectual manner from the time of making the covenant till the whole of the coal which could be fairly wrought became and was worked out, and that before the commencement of this suit, the whole of the coal under the said lands which could be fairly wrought became and was worked out and gotten, whereupon the defendant from thenceforth ceased further to work and carry on the said mines.

At the trial, before *Erle*, J., at the last assizes for the county of Flint, it appeared that the arrangement of the strata was as follows:—below the clay and slate is the hollin coal; below this is the brassy coal, and lowest of all the main coal. It was admitted that the defendants had not worked the brassy coal. The brassy coal was about three feet seven inches thick. It was stated by the plaintiff's witnesses to be a seam of saleable coal, capable of being worked at a fair profit; that there was a good roof and little water.

The defendants' witnesses said that the roof was bad, and that the seam was full of faults—of little value, and could not be worked at a profit. Some of the witnesses stated that no brassy coal was worth working. The defendants' counsel urged that the question was whether this seam of coal could be worked at a profit. The learned Judge told the jury that he would not give any explanation as to what was meant by "fairly wrought;" that the jury must judge of that;

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they were better judges of the meaning of the phrase than he was; he thought that it meant what could be got by a prudent person with a fair profit, however small. He said that if the defendants had worked out all the brassy coal that could be fairly wrought, they were entitled to the verdict. The jury found a verdict for the defendants.

*Welsby*, in Easter Term, had obtained a rule for a new trial, on the ground that the verdict was contrary to the evidence, and that the learned judge misdirected the jury in omitting to state to them what construction ought to be put upon the words "fairly wrought" in the lease.

*Hayes*, Serjt., *McIntyre*, and *Coxon*, now shewed cause.—The expression, "fairly wrought," means workable at a profit. The defendants were not bound to work at a loss, nor unless they could get some profit—not necessarily a great profit, nor even an average profit. If the meaning of the expression is matter of law, then the Court can now see what is the meaning of it. If mining usage has given it a particular meaning, there was no evidence of such usage in the present case. In *Jones v. Sheard*, (a) under an agreement to work a colliery "as long as it was fairly workable," it was held by *Coleridge*, J., that the defendants were not obliged to go on working as long as there was any coal to be found; they were not obliged to work at a dead loss. All the evidence was directed to the worthless character of the coal.

*Welsby* and *E. Beavan*, who appeared in support of the rule, were not called upon.

**POLLOCK**, C. B.—We are all of opinion that the direction of the learned judge was insufficient, and that the verdict

(a) 7 C. & P. 346.

cannot stand, therefore there must be a new trial. Profit is not the test whether this coal can be fairly wrought, though in one sense it is so, because the usages of mining are founded on what can be done advantageously. "Fairly wrought" means, that which can be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense.

**ALDERSON, B.**—I am of the same opinion. Surely it could not be contended, that if the market price of brassy coal were to fall, in consequence of the supply exceeding the demand, the defendants would be relieved from the liability to work. Some evidence seems to have been given that no brassy coal could be worked at a profit. The question however is, assuming that brassy coal in its usual state can be worked, was this brassy coal such as was fairly workable?

**MARTIN, B.**—I am of the same opinion. I think that the Judge was bound to state the meaning of the words in question, or to sum up the evidence as to it and ask the jury what they thought was the particular local meaning, if any.

Rule absolute (*a*).

(*a*) See *Hutchinson v. Bowker*, *Smart v. Morton*, 5 E. & B. 30; 5 M. & W. 535; *Elliot v. South Mellers v. Duke of Devonshire*, *Devon Railway Company*, 2 Exch. 725. As to the other point

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June 10.

BARNES v. HAYWARD.

If in pursuance of section 52 of the Common Law Procedure Act, 1854, a rule to strike out or amend a pleading as framed to prejudice the fair trial of the action is made absolute in its terms, the party obtaining it gets the costs as costs in the cause. If, when cause is shewn, the rule is varied, the plaintiff will not get the costs, unless by the rule the Court expressly gives them to him.

NEEDHAM had obtained a rule calling on the defendant to shew cause why the Master should not review his taxation, by allowing to the plaintiff the costs of amending the defendant's pleas.—After the pleas had been delivered, a rule nisi was obtained, calling on the defendant to shew cause, "why the first plea should not be struck out or amended, the same being framed so as to prejudice, embarrass, and delay the fair trial of the cause, or why either the first or second plea should not be struck out as founded on the same subject-matter." Cause being shewn against the rule, upon the argument the Court suggested the mode in which the plea ought to have been framed; and a rule was made absolute, by which it was ordered, that the first plea should be amended in a particular way, and as to the residue of the rule, that the same should be discharged. The rule made no mention of costs. An order was afterwards drawn up, that the proceedings should be stayed on payment of the debt and costs to be taxed. On taxation, the Master refused to allow the plaintiff the costs of the rule nisi and rule absolute, and proceedings in relation to the amendment of the defendant's pleas; whereupon the present rule was obtained.

Prentice now shewed cause.—By the 52nd section of the Common Law Procedure Act, 1852, the costs of the application are not costs in cause, but are in the discretion of the Judge. The rule was not made absolute in its terms, but discharged as to part of the things asked for.

Needham, in support of the rule.—The rule was in the

alternative. The plaintiff was compelled to come to the Court for an order, that the pleadings should be reformed, and the Court made an order under the 52nd section, for the amendment of the plea.

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ALDERSON, B. — If a rule is made absolute in its terms, the party obtaining it gets the costs as costs in the cause. If it is varied, the costs do not follow as of course, but if the party obtaining it wishes any special terms, he should ask to have them inserted in the rule. The plaintiff should have asked for these costs.

MARTIN, B. — Neither of the things which the plaintiff asked for was granted, but something different. It would be very inconvenient if the rule was not as stated by my brother *Alderson*. It would lead to constant discussions before the Master as to the costs of rules. As the not giving the costs was evidently an omission, this rule will be discharged without costs.

POLLOCK, C. B., concurred.

Rule discharged.

INSOLE v. JAMES and Another.

June 11.

CASE.—The declaration stated, that the plaintiff was possessed of certain coal mines, lands, and premises, with the appurtenances, and the plaintiff then of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoy, and still of right ought

to have and enjoy the water of a stream which had been used to flow alongside the said lands and premises, is not supported by proof that the plaintiff was a lessee of mines under land adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes.

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stream which had been used to flow alongside the said lands and premises, and which ought of right to have run and flowed, and still of right ought to run and flow, in its usual and proper course, along the said land of the plaintiff; but that the defendants diverted the said stream at a part higher up on the stream than the plaintiff's aforesaid land and premises.

Pleas.—First, not guilty; secondly, that the plaintiff was not possessed of the said lands and premises.

At the trial, before *Williams*, J., at the last assizes for the county of Glamorgan, it appeared that the plaintiff was the lessee of certain collieries, and that the defendants had diverted a considerable portion of the water of a stream which flowed alongside the land under which the plaintiff's mines lay. The plaintiff was not in possession of the surface-land adjoining the stream; but the demise of the collieries to him contained a grant of "liberty to use and enjoy for colliery purposes," all streams, brooks, and right of water appertaining and belonging to the said farm and lands," &c. The plaintiff had never used the water of the river for colliery purposes. The learned Judge directed a verdict for the defendants, reserving leave to plaintiff to move to enter a verdict for him.

*Grove*, in Easter Term, obtained a rule accordingly, against which

*Evans* (*Phipson* and *G. B. Hughes* with him), now shewed cause.—The grant, if such a grant could be made, which is very doubtful, was only for colliery purposes. The plaintiff's rights are not those of a riparian proprietor. Whatever right he may have, it is not that which is claimed in the declaration. (They were then stopped by the Court.)

*Grove* and *Giffard* appeared in support of the rule.

Per *CURIAM*.—Whatever the plaintiff's rights may be

under the lease, as to which we need express no opinion, the question is not open on the present record. A material issue, viz., the traverse of the possession of the land adjoining the stream, has been rightly found for the defendants. The rule must therefore be discharged.

Rule discharged.

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LUCE v. IZOD.

June 12.

**LUSH** had obtained a rule to shew cause why the defendant should not be at liberty to plead an equitable defence.

The declaration was on a deed, by which the plaintiff and defendant, who were practising as surgeons in Swallowfield and Stratfield Mortimer, dissolved partnership; and the defendant covenanted that he would not practice as a surgeon in the parish of Swallowfield or Shinfield, in the county of Berks, without the express consent of the plaintiff, and it alleged as a breach, that he did so practice. The abstract of the plea sought to be pleaded was as follows:—(After setting out the deed)—that a part of Shinfield is in the Stratfield Mortimer practice, and that in a certain account mentioned in the deed, its value constitutes part of the value of that practice, and that such value was computed from the ledger of the accounts of that practice, which ledger included the accounts of patients residing in the said part; that the defendant paid the plaintiff for the privilege of exclusive practice in that part of Shinfield; that it was not intended that the covenant should restrain him from practising in that part of Shinfield, but that the covenant was so framed by mistake, owing to the circumstance that the part in question is surrounded by the district of the Stratfield practice, and was habitually identified by the parties with, and was part

On a motion for a rule to shew cause why an equitable plea should not be allowed, the Court directed that an option should be given to the plaintiff of having the issue tried by the Court.

In an action on a covenant binding the defendant not to practice in S., the Court allowed an equitable plea that as between the defendant and the plaintiff the part of S., in which the defendant practised, had always been treated as being in S. M., and that it was not intended by the parties to restrain the defendant from practising in the part of S. in question; and that the covenant, as set forth in the declaration, was so framed by mistake.

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of that district (and therefore that the covenant ought to be reformed by excepting therefrom the part in question), and that the breaches were committed in that part.

The Court directed that it should be made part of the rule, that the issue on the plea should be decided by the Court instead of by the jury, so that the Court might either direct the issue to be tried by a Judge, or otherwise give relief according to its own view of the case.

Manisty now shewed cause.—The defendant wants to plead, by way of equitable defence, that the covenant was erroneously drawn, and ought to be reformed. The plaintiff objects to power being given to the Judge to dispose of the plea. A Judge cannot reform the agreement, and then try the action as if brought on such reformed agreement. [*Martin, B.*—The plea affords sufficient ground for a perpetual injunction. The defendant is entitled to say, that as between him and the plaintiff part of Shinfield was considered as within Stratfield Mortimer.]

POLLOCK, C. B.—In a recent case before us, an equitable plea was disposed of by a jury in a very unsatisfactory way. We considered it for the advantage of the plaintiff, and more satisfactory, that such an issue should be tried by the Judge. The rule will be absolute that the defendant be at liberty to plead the plea, striking out so much as alleges that the covenant ought to be reformed.

MARTIN, B., and BRAMWELL, B., concurred.

Rule absolute accordingly.

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SOUTHCOTE v. STANLEY.

June 4.

THE declaration stated, that at the time of the committing of the grievances, &c., the defendant was possessed of an hotel, into which he had then permitted and invited the plaintiff to come as a visitor of the defendant, and in which the plaintiff as such visitor then lawfully was by the permission and invitation of the defendant, and in which hotel there then was a glass door of the defendant, which it was then necessary for the plaintiff, as such visitor, to open for the purpose of leaving the hotel, and which the plaintiff, as such visitor, then by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened: nevertheless, by and through the mere carelessness, negligence, and default of the defendant in that behalf; the said door was then in an insecure and dangerous condition, and unfit to be used or opened, and by reason of the said door being in such insecure and dangerous condition, and unfit as aforesaid, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass from the said door fell out of the same, to and upon the plaintiff, and wounded him, and he sustained divers bodily injuries, and remained ill and unable to work for a long time, &c.

Demurrer and joinder therein.

Raymond, in support of the demurrer.—The declaration

the then carelessness, negligence, default and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff.

Held, that the declaration disclosed no cause of action against the plaintiff.

A declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a visitor, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened: nevertheless by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition and unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of

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discloses no cause of action. It is not stated that the plaintiff was in the hotel as a guest, but merely as a visitor; and there is no allegation that the defendant knew of the dangerous condition of the door. To render the defendant liable, the declaration ought to have shewn some contract between the plaintiff and the defendant, which imposed on the latter the obligation of taking care that the door was secure; or it should have alleged some negligence on the part of the defendant in the performance of a duty which he owed to the plaintiff. [*Bramwell*, B.—If a person invites another into his house, and the latter can only enter through a particular door, is it not the duty of the former to take care that the door is in a secure condition?] He may not be aware that the door is insecure. This declaration only alleges, that through the carelessness, negligence, and default of the defendant, the door was in a dangerous condition: that cannot be read as involving the allegation that the defendant knew that the door was insecure. All facts necessary to raise a legal liability must be strictly averred; *Metcalfe v. Hetherington*(a). [*Alderson*, B.—It is not stated that it was the duty of the defendant, as an hotel keeper, to take care that the door was secure. Suppose a person invites another to his house, and the latter runs his hand through a pane of glass, how is the former liable?—The Court then called on

*Gray*, contra.—The declaration shews a duty on the part of the defendant, and a breach of that duty. It is immaterial whether the injury takes place in a private house, or in a shop, or in a street; the only question is, whether the person who complains was lawfully there? The case is similar in principle to that of *Randleson v. Murray*(b), which decided that a warehouseman, who

(a) 11 Exch. 257.

(b) 8 A. &amp; E. 109.

lowers goods from his warehouse, is bound to use proper tackle for that purpose. [Alderson, B.—It is the duty of every person who hangs anything over a public way to take care that it is suspended by a proper rope.] Whether it be a private house or a shop, a duty is so far imposed on the occupier to keep it reasonably secure, that if a person lawfully enters, and through the negligence of the occupier in leaving it in an insecure state, receives an injury, the occupier is responsible. Here it is alleged that the defendant invited the plaintiff to come into the hotel as a visitor; that shews that he was lawfully there. [Pollock, C. B.—The position, that an action lies because the plaintiff was lawfully in the house, cannot be supported: a servant is lawfully in his master's house, and yet if the balusters fell, whereby he was injured, he could not maintain an action against the master. If a lady, who is invited to dinner, goes in an expensive dress, and a servant spills something over her dress, which spoils it, the master of the house would not be liable. Where a person enters a house by invitation the same rule prevails as in the case of a servant. A visitor would have no right of action for being put in a damp bed, or near a broken pane of glass, whereby he caught cold. Alderson, B.—The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and those who come by invitation.]

Pollock, C. B.—We are all of opinion that the declaration cannot be supported, and that the defendant is entitled to judgment. I do not think it necessary to point out the reasons by which I have come to that conclusion; because it follows from the decision of this Court (*a*), that the mere relation of master and servant does not create any implied

(a) *Priesley v. Fowler*, 3 M. & W. 1.

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duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. That decision has been followed by several cases (*a*), and is now established law, though, I believe, the principle was not recognised until recent times. The reason for the rule is, that the servant undertakes to run all the ordinary risks of service, including those arising from the negligence of his fellow servants. The rule applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow servant; neither can one servant maintain an action against another for negligence whilst engaged in their common employment. The same principle applies to the case of a visitor at a house: whilst he remains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest.

ALDERSON, B.—I am of the same opinion.

BRAMWELL, B.—I agree with Mr. *Gray* to this extent, that where a person is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring-guns or men-traps, and the latter, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and

(*a*) See *Hutchinson v. The Newcastle, York and Berwick Railway Company*, 5 Exch. 343; *Wiggett v. Fox*, 11 Exch. 632.

the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission. This declaration merely alleges that "by and through the mere carelessness, negligence, default and improper conduct of the defendant," the glass fell from the door. That means a want of care—a default in not doing something. The words are all negatives, and under these circumstances the action is not maintainable. I doubted whether the words "carelessness, negligence, and improper conduct," &c., might not mean something equivalent to actual commission, but on the best consideration which I can give the subject, it appears to me that they do not mean that, but merely point to a negative. If I misconstrue the declaration, it is the fault of those who so framed it.

Judgment for the defendant.

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EVANS v. HARRIES.

June 9.

**S**LANDER.—The declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c., was, and carried on the trade and business of an innkeeper at a certain inn or public-house, called, &c.; and the defendant, well knowing the premises, falsely and maliciously spoke and published of the plaintiff, in relation to him the plaintiff in his said trade and business, and the carrying on and conducting thereof by him the plaintiff, in the presence and hearing of divers persons, to wit, at the said inn or public-house, and in the presence and hearing of divers guests and customers of the plaintiff and other

In an action for slander of the plaintiff in his business of inn-keeper, it is sufficient to allege and prove, as special damage, a general loss of custom, without stating the names of the customers who ceased to frequent the inn.

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persons there then being, the words following:—(The declaration then set out the words.)—Whereby and by reason whereof the plaintiff has been and is greatly injured in his said trade and business, and has experienced and sustained sensible and material diminution and loss in the custom and profits of the said inn in his trade and business aforesaid, by divers persons, in consequence of the committing of the said grievances, whose names are to the plaintiff unknown, having avoided the said inn or public-house, and abstaining from being guests and customers of the plaintiff as such innkeeper as aforesaid in his said trade and business, as they otherwise would have been but for the committing of the said grievances by the defendant.

Plea.—Not guilty.

At the trial before *Williams*, J., at the last Pembrokeshire assizes, the slander, having been proved, the plaintiff's counsel proposed to ask the plaintiff whether he had found any difference in the profits of his business since the uttering of the slander. This question was objected to by the defendant's counsel, but the learned Judge overruled the objection, and the plaintiff stated "that his business was less, and that many customers had ceased to come to his house." The learned Judge left it to the jury to say whether the loss of business arose from the slander, and his lordship directed them to assess the damages separately, whereupon the jury found 15*l.* for the slander and 5*l.* for the loss of business.

Giffard, in the following term, obtained a rule nisi for a new trial, on the grounds, first, that the evidence of the loss of business was improperly received; secondly, that the learned Judge misdirected the jury in leaving to them whether the loss in business arose from the slander, there being no sufficient evidence of such loss.

Evans (*Grove* with him) now shewed cause.—The evidence of loss of business was admissible, and the question was properly left to the jury. The case falls within the principle of the decision in *Hartley v. Herring* (*a*). There the declaration alleged that the plaintiff was employed to preach at a dissenting chapel, and that the defendant charged him with incontinence, per quod the persons frequenting the chapel refused to permit him to preach there, and discontinued giving him the profits which they usually had, and otherwise would have given; and that was held sufficient without saying who those persons were, or by what authority they excluded him. Lord *Kenyon*, C. J., said, “Where a plaintiff brings an action for slander by which he lost his customers in trade, he ought in his declaration to state the names of those customers, in order that the defendant may be enabled to meet the charge, if it be false. But here the plaintiff was in possession of this office, and we are to conclude upon this record that he was properly licensed: but how could he have stated the names of all his congregation? He has stated, that in consequence of the words spoken of him by the defendant he was removed from his office, and lost the emoluments of it, which I think is sufficient.” So here, it would be difficult for the plaintiff to ascertain the names of the customers, or the reason why they ceased to frequent his house; but the house having been less frequented immediately after the slander, it is natural to conclude that the loss of custom arose from it. So in *Ashley v. Harrison* (*b*), which was an action for libelling a performer at a theatre, who, in consequence, refused to appear, whereby the plaintiff lost the profits of her performance, Lord *Kenyon* ruled, that under the latter allegation the plaintiff might shew that the receipts of the

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(*a*) 8 T. R. 130.

(*b*) 1 Esp. 47.

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house had declined, but not that particular persons had given up their boxes, since that was damage which should have been specially alleged in the declaration.

Giffard and *Bowen*, in support of the rule.—General evidence of the loss of custom was not admissible. [*Martin*, B.—How is a public-house keeper whose only customers are persons passing by, to shew a damage resulting from the slander unless he is allowed to give general evidence of a loss of custom?] In order to entitle the plaintiff to have such evidence submitted to the jury, he ought to have excluded every other cause from which a loss of custom might have arisen; as, for instance, the neighbourhood having become more temperate, or another inn having been opened. [*Martin*, B.—Suppose a person falsely stated that an eating-house keeper sold unwholesome food, whereby he lost his business; how is he to know the names of all his customers who left? *Pollock*, C. B.—Here there was evidence of a loss of custom, and no other reason could be assigned for it but the slander.]

Per *CURLAM* (*a*).—The rule must be discharged.

Rule discharged.

(*a*) *Pollock*, C. B., *Martin*, B., and *Bramwell*, B.



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BROOM v. BATCHELOR.

June 9.

THE declaration stated, that before and at the time of the making of the promise therein mentioned one Edge had been and was a manufacturer of carpets, and for a long time before then elapsed had been accustomed to buy goods of the plaintiff for the purposes of his said trade upon credit, and had been used and accustomed to pay for the said goods by bills of exchange accepted or otherwise given by the said Edge to the plaintiff: that the defendant on &c., in consideration that the plaintiff would continue to give such credit as aforesaid to the said Edge, agreed to guarantee the payment of all bills of exchange drawn by the plaintiff and accepted by Edge, and also the payment of any balance that might at any time thereafter be due from Edge to the plaintiff.—Averment: that although he the plaintiff did continue to give credit to the said Edge in pursuance of the said agreement, and to supply the said Edge with goods in the way of his trade upon such credit as aforesaid; and although after the making of the said agreement a certain bill of exchange drawn by the plaintiff upon Edge for the sum of 132*l.* 15*s.* payable four months after date, and accepted by Edge, became due and payable; and although there was at the time of the commencement of this suit a large sum of money, to wit, the sum of 500*l.* due &c. from Edge to the plaintiff, of which the defendant before suit had notice,

extended to future as well as to past transactions: per *Pollock*, C. B. and *Martin*, B., *dissentiente*.

Also per *Pollock*, C. B., and *Martin*, B., that the principle of construction *ut res magis valcat quam pereat* applied. Per *Bramwell*, B., that the words *prima facie* referred to past transactions, that the latter clause was explanatory and did not add to the former; and that the maxim in question does not apply in cases where there are extrinsic circumstances in relation to which the words used are in their primary sense intelligible.

A guarantee given by the defendant to the plaintiff was as follows:—“In consideration of the credit given by B. to E., I hereby agree to guarantee the payment of all bills of exchange drawn by the said B. and accepted by E. Also I hereby agree to guarantee the payment of any balance that may be due from the said E. to the said B. This guarantee to include all bills of exchange now running as well as the balance of account at this day.”—

It appeared that at the time of the giving of the guarantee there were bills running and an account due from E. to B., and future dealings between the parties were contemplated.

Held, that the guarantee

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yet the defendant did not nor would indemnify the plaintiff, nor pay to him the moneys so due to him upon and in respect of the said bill of exchange and the said balance of account.

Pleas (*inter alia.*)—First: that defendant did not agree as alleged. Secondly: that the plaintiff did not continue to give credit to Edge in pursuance of the said agreement as in the declaration mentioned.—Issues thereon.

At the trial before *Bramwell*, B., at the Spring Assizes for the county of Worcester, it appeared that the plaintiff had been in the habit of supplying goods to one Edge on credit. In May, 1854, Edge, being indebted to the plaintiff in 121*l.* 9*s.* 10*d.* for goods supplied, and in 989*l.* 2*s.* secured by five bills of exchange accepted by Edge and then running, the plaintiff applied to him for security, and it was then agreed between the plaintiff and Edge that if the plaintiff would continue to give credit to Edge, the defendant would guarantee Edge's account. The following guarantee was accordingly signed by the defendant, and handed by him to the plaintiff:—

“Memorandum of agreement between Samuel Broom and James Batchelor. In consideration of the credit given by Mr. Samuel Broom to Mr. Joseph Edge, I hereby agree to guarantee the payment of all bills of exchange drawn by the said Samuel Broom, and accepted by the said Joseph Edge. Also I hereby agree to guarantee the payment of any balance that may be due from the said Joseph Edge to the said Samuel Broom. This guarantee to include all bills of exchange now running, as well as the balance of account at this day.—Dated the 26th day of May, 1854.

“JAMES BATCHELOR.”

After the giving of the guarantee the plaintiff continued to supply Edge with goods in the way of his trade upon credit till January 1856. It appeared that all the debts

due from Edge to the plaintiff at the date of the guarantee had been satisfied, and the bills then running had been duly paid. On cross-examination the plaintiff stated that this guarantee had been given in lieu of an old one, which was admitted to have referred to future transactions. He said that he wished for a new one, because the old one was not stamped. On the 22nd of January, 1854, a bill for 132*l*. 15*s.*, accepted by Edge, and made payable to the plaintiff, became due and was dishonoured. The plaintiff's attorney applied to the defendant to pay the bill, and on his refusing to do so the present action was brought.

At the close of the plaintiff's case the defendant's counsel objected that no consideration appeared on the face of the guarantee (*a*), and that the guarantee applied only to past transactions. The learned Judge directed a verdict for the plaintiff for the amount claimed, reserving leave to the defendant to move to enter a verdict for him.

Whateley, in Easter Term, obtained a rule nisi accordingly, against which

Keating and *Phipson* now shewed cause (May 29).—If the consideration can be read as a future consideration, the Court will so read it. That it may be so read is clearly established by the authorities. In *Haigh v. Brooks* (*b*), *Steele v. Hoe* (*c*), *Butcher v. Stewart* (*d*), *King v. Cole* (*e*), *Tanner v. Moore* (*f*), the terms were ambiguous, and the instruments might have been treated as referring to past considerations. The rule that the construction shall be, "ut res magis valeat quam pereat," applies to the present case. *Mare v. Charles* (*g*) is a very strong case, recently decided by the Court of Queen's

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| (<i>a</i>) By 19 & 20 Vict. c. 97, s. 3, | (<i>c</i>) 14 Q. B. 431. |
| the consideration for a guarantee | (<i>d</i>) 11 M. & W. 857. |
| made after the passing of that | (<i>e</i>) 2 Exch. 628. |
| Act need not appear in writing. | (<i>f</i>) 9 Q. B. 1. |
| (<i>b</i>) 10 A. & E. 309. | (<i>g</i>) 5 E. & B. 978. |

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Bench, where that rule was acted upon. [*Pollock*, C. B.—It is a fair rule of construction, but we should not adopt it if we thought it clear that it would not carry out the intentions of the parties.]—The natural construction of this guarantee is, that but for the two last clauses it would not extend to past transactions. The use of the word “include” shews that the guarantee extends to future transactions. The part which is included is less than the whole which includes it.

Whateley and *Skinner*, in support of the rule.—There is no rule that a guarantee which may be construed as referring to future transactions must be so construed. The true meaning must in all cases be collected from the instrument. Here the words “credit given” cannot have a double meaning so as to refer to past as well as future credit; *Raikes v. Todd* (a). In a considered judgment in *Nicholson v. Paget* (b), *Bayley*, B., said, that “it is not unreasonable to expect from a person who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which intelligibly point to the party giving the guarantee, the extent to which he expects that the liability is to be carried.” [*Bramwell*, B.—In another case you will find it laid down that he who would limit his liability must take care to do so (c).] In the document before the Court, “the credit,” means the existing credit—“credit given and all bills drawn”—both refer to the past. “May be due” means what may be found to be due on taking the account. In *Allnutt v. Ashenden* (d), a guarantee of A.’s account was held to extend only to his existing account.

Cur. adv. vult.

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| (a) 8 A. & E. 846. They referred also to <i>Haves v. Armstrong</i> . | (c) See <i>Hargreave v. Smee</i> , 6 Bing. 244. |
| <i>strong</i> , 1 Bing. N. C. 761. | (d) 5 M. & G. 392. |
| (b) 1 Cro. & M. 48. | |

There being a difference of opinion amongst the learned Judges, they now delivered their opinions seriatim.

BRAMWELL, B.—I am of opinion that this rule should be made absolute. The guarantee on which the action is founded is as follows:—"Memorandum of agreement between Samuel Broom and James Batchelor. In consideration of the credit given by Mr. Samuel Broom to Mr. Joseph Edge, I hereby agree to guarantee the payment of all bills of exchange drawn by the said Samuel Broom and accepted by the said Joseph Edge. Also, I hereby agree to guarantee the payment of any balance that may be due from the said Joseph Edge to the said Samuel Broom. This guarantee to include all bills of exchange now running as well as the balance of account due at this day." The facts were, that at the date of the guarantee the plaintiff had had dealings with Edge; that there were bills of exchange and a balance as mentioned in the guarantee; that for them and for future dealings the defendant was responsible by a guarantee already given by him for which this was substituted, and that the plaintiff and Edge contemplated future dealings, of which the defendant was aware. There was, therefore, matter past and future, to one or both of which the guarantee might extend. The question is, whether it extended to both, or to the past only? I am of opinion that it was limited to the past. "Given" is the past participle, and, *prima facie*, must have its primary natural meaning, viz., "already given." The same remark applies to the words "drawn" and "accepted." In like way, in the next sentence, "may be" is the present tense, and *prima facie* means "now may be." Again, the definite article "the" is used in speaking of the credit given, as though that credit was something ascertained and known. It certainly cannot be denied that these words and expressions all apply to and

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include past transactions; and it is strange that there is in this part of the guarantee no word relating to the future; and yet that it should be read thus: "In consideration of the credit given *and any credit to be given*, I guarantee all bills drawn *and to be drawn*, accepted *and to be accepted*, and any balance that may *or shall* be due." Such a construction could not be contended for, but for two circumstances to which I now refer. The first is, that the last clause in the guarantee shews that the former clauses did not extend to past, and so must extend to future bills and balances, and, no doubt, if the former clauses do not extend to past transactions they must apply to future. But, read alone, they clearly include the past, and I am of opinion that read with the last clause their construction remains the same. The last clause is explanatory, not additional, in its effect. It does not, like the second, begin with "also, I agree to guarantee," or any equivalent expression. It does not say, "this guarantee to extend to," but, explaining what has gone before, and speaking of it as existing—"this guarantee"—it says what it is to include. But if it is an explanatory clause and shews that the former clauses did include past transactions, the argument, founded on their having no operation unless they apply to the future, fails. Indeed this last clause, to my mind, confirms the defendant's construction, for, as I observe no words of extension or addition used in it, I do not see on what principle, if it is viewed as an explanatory clause, we are to say that these matters are included in addition to those expressly named. It certainly, too, is singular that this clause, if a clause of extension, should have extended the guarantee to that which *prima facie* is meant by the prior clauses; viz., past transactions, and not to those which, *prima facie*, are not meant, viz., future.

The other matter relied on by the plaintiff is, that if

the word "given" is read as past, there is no consideration and the document is void, and so, *ut res magis valeat quam pereat*, it must be read as "to be given." And I agree that if extrinsic circumstances shewed that that must be the meaning, it might be so read: but I wholly deny the application of that maxim to a case like the present where there are extrinsic circumstances in relation to which the words used are, in their primary sense, intelligible. It would be to translate the maxim referred to, thus, "rather than there should be an invalid agreement about one matter, misconstrue it, and make it apply to another." But, further, on the plaintiff's construction these difficulties arise: "given" cannot well mean "given and to be given," and yet it is difficult to suppose the parties did not consider the past credit as a consideration in fact. However, let it be read so, or let it be read thus—"the credit to be given;" in either view the future credit is the only consideration in law. What is the result? Is the guarantee as to past transactions void? The parties clearly did not mean that. Is it only operative as soon as a fresh credit is given? If so, it was, till then, revocable by the defendant. The parties did not mean that. Further, on the latter supposition the defendant becomes liable for the whole amount of past debt as soon as a trifle of fresh credit is given. No doubt, if the plaintiff agreed to give a future credit, and in consideration of that the defendant agreed to guarantee past and future dealings, the guarantee would be good; but there is no pretence for saying that this is the meaning of the document; the plaintiff is bound to nothing. It is unnecessary to refer to the authorities; they shew no doubt that when words, *prima facie* importing a past consideration, are insensible with reference to extrinsic circumstances, unless understood to mean future consideration, and they are capable of that meaning, they shall have it. I decide

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this case on the ground on which *Allnutt v. Ashenden* (a), which is in point, was decided, viz., that the words are intelligible in their primary meaning with reference to extrinsic circumstances, and consequently that meaning they are to have and no other; and that meaning, for the reasons I have given, I think is to guarantee past transactions only.—The plaintiff said that this guarantee had been given in lieu of an old one, he desiring to have such a guarantee on a stamp and the old one not being on a stamp. That reason may be true in point of fact, though invalid in point of law, because the old guarantee did not require a stamp, as being an agreement relating to the sale of goods. The defendant's contention, on the other hand, although not proved, was, that he desired to get rid of his liability for future matters, and cancelled the old guarantee and gave this one for the past debt. This question should, in any view of it, have been left to the jury, and there ought therefore to be a new trial. I thought that neither party asked to have it left, and I did not think it required to be left, because it appeared to me that the guarantee was on the face of it intelligible and capable of being construed with reference to the other extrinsic circumstances of the case.

MARTIN, B.—I am of opinion that this rule should be discharged. The facts as proved at the trial were these;—that the plaintiff, Samuel Broom, had received in payment from Joseph Edge several bills of exchange, and was also his creditor on a balance of account, and that it was then intended that further business should take place between them; and, thereupon, the defendant gave to the plaintiff the guarantee stated in the judgment of my brother

Bramwell. It was contended, that upon the face of this writing the guarantee extended only to past transactions, and was therefore void for want of consideration. I am of opinion that it is not void. I quite feel that it is impossible to reconcile all the decisions which have taken place upon the subject, but it seems to me that the late cases are the more correct, and that to the construction of contracts of this kind, the rule that contracts should be construed "ut res magis valeat quam pereat" applies. This doctrine has been very recently applied by the Court of Queen's Bench in the case of *Mare v. Charles* (*a*), and with the general view there expressed by that Court I entirely concur. If the writing be read as contended for by the defendant, it is entirely void and unavailing, but if read as meaning that upon credit being afterwards given the guarantee should attach, it is valid and effectual. It is my opinion that the writing shews that future credit was intended. The last stipulation provides that the guarantee should include all bills of exchange then running, and also the existing balance of account. This seems to me to shew that these were something different from the bills of exchange and balance of account mentioned in the former part of the writing, and if so these last could be nothing but bills of exchange thereafter to be given, and the balance of account thereafter to grow due. If this is so, then the cases of *Haigh v. Brooks* (*b*), *Butcher v. Stuart* (*c*), and *Goldshede v. Swan* (*d*), are distinct authorities that the writing ought to be read as "in consideration of the credit to be thereafter given;" in other words, that the ambiguous expressions ought to be read ut res magis valeat. It seems to me that this writing ought to be construed in the same manner as the writing was in

(*a*) 5 E. & B. 978.

(*c*) 11 M. & W. 857.

(*b*) 10 A. & E. 309.

(*d*) 1 Exch. 154.

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White v. Woodward (*a*), as meaning that conditionally on a real and bona fide future credit to be given by the plaintiff to Mr. Edge the defendant contracts to guarantee. I think that the original view of my brother *Bramwell* was correct, and that this rule must be discharged.

POLLOCK, C. B.—The question for our decision in this case is this: what is the meaning of a certain writing by which the defendant agreed to guarantee the payment of “bills of exchange, and any balance” creating a debt from one Joseph Edge to the plaintiff? Is the guarantee confined to bills running at the date of the guarantee and to the balance then due, or does it extend to bills and balances arising thereafter? In order to interpret the document, the Court may, no doubt, be informed by the evidence given in the cause of every circumstance between the parties calculated to throw any light upon what they intended by the language used. Here there had been former dealings, and future dealings were contemplated. It may be well to consider what is the meaning of the first part of the guarantee without reference to the second part, which states what it is to include. The expression “in consideration of the credit given I hereby agree to guarantee the payment of all bills drawn by Broom, and accepted by Edge, also, I hereby agree to guarantee the payment of any balance that may be due,” in my judgment relates *prima facie* to future transactions. The word “given” is indefinite in point of time. It is no doubt the perfect, but it may mean past, present, or future. The word “drawn” is also equivocal; but the expression “may be” is, in my judgment, clearly future.—I have been unable to find any authority in any dictionary; but in Cruden’s Concordance of the Bible from sixty to

(*a*) 5 C. B. 810.

eighty references are given to the expression "may be," nine out of ten of which have manifestly a reference to the future, and not one is necessarily future. The Concordance of Shakspeare gives no references to words so common as "may" and "be." But as far as I can bring my knowledge of the English language to bear upon the subject, "may be," is much oftener used with reference to the future than the past or the present.—It does not mean the balance now due. If that was intended nothing was more easy and obvious than to say so. It does not in my judgment mean the balance which, upon an investigation of the accounts, may turn out to be due at this moment. The period is indefinite, and, according to all the authorities I can find, "may be" relates to the future rather than the past. If this be true, then the ambiguous expression "drawn," which no doubt may mean already drawn, or to be drawn, must be expounded in like manner and must receive a construction relating to the future. But then comes the clause alleged to be explanatory only, and that says, "this guarantee to include all bills now running as well as the balance of account at this day." If the former part related to the future only, this clause was necessary to make the guarantee apply to bills then running and to the balance then due, and this construction is much aided by the consideration that it must be presumed that the parties meant something by what they agreed to; whereas, if the construction contended for by the defendant be the true one, the agreement operated nothing and was wholly void for want of a consideration. I agree with my brother *Martin* that the rule ought to be discharged. The rule therefore will be discharged.

Rule discharged.

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The defendant having contracted with the Lords of the Admiralty to provide a steam-vessel for exploring the river Niger, wrote to the plaintiff as follows :—
 “I am willing to give you the command of the steamer destined for an exploring and trading voyage up the river Niger and its tributaries. Your pay to be at the rate of 50*l.* per month commencing from the 1st December, 1853, and a commission of 20 per cent. on the net proceeds of the produce you may bring down.”—In reply, the plaintiff wrote to the defendant as follows :—
 “In answer to your letter of yesterday offering me the command of the vessel to go

THE declaration stated, that in December, 1853, the defendant had entered into an arrangement with the Lords of her Majesty’s Admiralty to build a steam-vessel for them, and to find the vessel and all appertaining to her, in order that she might be sent out by the said Lords of the Admiralty to Africa, and thence proceed with certain Government officers to survey and explore the river Niger, in Africa aforesaid, and its tributaries, in an exploring and trading expedition, upon certain terms agreed upon between the defendant and the said Lords of the Admiralty; and thereupon, by an agreement between the plaintiff and the defendant, the plaintiff and the defendant agreed that the defendant should give to the plaintiff, and the plaintiff should take, the command of the said vessel when she was built, and proceed with her on the said expedition; that the pay of the plaintiff should be at the rate of 50*l.* per month, commencing from the 1st December in the year aforesaid, and that the plaintiff should also be paid a commission of twenty per cent. on the net proceeds of the produce the plaintiff might bring down the said river &c.—(The declaration then stated other stipulations not material to the present question.)—Averments: that after the making of the said agreement the vessel was completed and built, and the defendant gave to the plaintiff certain instructions as to the carrying out of the said agreement, and the said vessel

out in a trading and exploring voyage to the river Niger and its tributaries *at a fixed pay of 50*l.* per month and 20 per cent. on the net proceeds of the goods obtained*, I beg leave to say that I accept the service and the terms you mention.”—The vessel proceeded up the Niger under the command of the plaintiff as far as Dagbo when the plaintiff refused to proceed further and abandoned the command.

Held, that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost or divested by the plaintiff’s desertion or abandonment of the contract.

proceeded under the command of the plaintiff upon the said expedition; and the plaintiff undertook the said command and acted as commander of the said vessel according to the said agreement; and the plaintiff observed, in all respects, the said instructions from the defendant, and large quantities of produce were brought down the said river by the plaintiff during the said expedition, and sold, and proceeds received therefrom; and the plaintiff has observed, in every respect, the said agreement on his part and has done all things necessary &c. to entitle the plaintiff to have the said pay and commission paid to him, according to the terms of the said agreement, and to have the said agreement performed in every respect by the defendant.—Breaches: that the defendant has not paid the said pay, but a large sum, to wit 1,000*l.*, is still due; nor has the defendant paid the plaintiff the commission upon the net proceeds of produce brought down the said river by the plaintiff during the said expedition, but a large sum of the same for commission, to wit 500*l.*, is still due.—There was also a count for work and materials, journeys and attendances, commission, salaries and allowances.

Pleas (*inter alia*) to first count—First: that the defendant did not promise or agree as alleged. Secondly: that the plaintiff did not act as commander of the said vessel according to the said agreement, nor did the plaintiff observe the said instructions from the defendant; nor were such quantities of produce brought down the said river by the plaintiff during the said expedition, nor sold, nor proceeds received thereon as alleged; but on the contrary thereof, the plaintiff wholly failed and made default in the respective premises. To the residue of the declaration, never indebted and payment.—Issues thereon.

At the trial before *Pollock*, C. B., at the London sittings after last Michaelmas Term, the following facts appeared.—

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In March, 1852, the defendant entered into an agreement with the Lords of the Admiralty to build a screw steam-vessel for the purpose of exploring the river Niger and its tributaries. It was also to be a trading expedition. The plaintiff applied to the defendant for employment on the expedition, and, after some correspondence, the defendant, on the 20th December, 1853, wrote to the plaintiff as follows:—

“ Referring to what passed, I now beg to state that I am willing to give you the command of the steamer now building by Mr. John Laird, of Birkenhead, and destined for an exploring and trading voyage up the river Niger and its tributaries. Your pay to be at the rate of 50*l.* per month, commencing from the 1st December, and a commission of twenty per cent. on the net proceeds of the produce you may bring down. The cabin table to be found by you. The vessel is intended to be sailed out to Fernando Po, and there to take on board the officers appointed by the Admiralty to survey and explore the river; these officers are to be treated as passengers. Your acceptance of this offer will be considered conclusive.”

On the 21st December the plaintiff wrote to the defendant as follows:—

“ In answer to your letter of yesterday, offering me command of the vessel you are now having built, to go out on a trading and exploring voyage to the river Niger and its tributaries at a fixed pay of 50*l.* per month, and 20 per cent. on the net proceeds of the goods obtained, I beg leave to say that I accept the service and the terms you mention.”

The defendant afterwards gave to the plaintiff written instructions for his guidance during the expedition. These instructions stated that the main design of the voyage was to ascend the River Tchadda, the eastern branch of the Niger, as high as possible during the rise of the river. The

vessel sailed from Liverpool in May, 1854, and in the following month arrived at Fernando Po, where the officers appointed by the government to accompany the expedition came on board, and the plaintiff took the command of the vessel. The vessel left Fernando Po on the 8th July, and proceeded on the expedition up the River Tchadda. On the 16th August, when the vessel was about eight miles short of Dagbo, which had been already reached by former travellers, the plaintiff wished to terminate the expedition, stating that it was impossible to proceed further up the river. The government officers would not consent, inasmuch as the object of the expedition would be thereby frustrated, whereupon the plaintiff refused to act any longer as master, and on the 17th August the chief government officer took the command of the vessel. The vessel proceeded about 250 miles above Dagbo, and on the 28th September began to return, the river not being navigable after that month until the following July. The vessel arrived at Fernando Po on the 7th instant, when the command was again given up to the plaintiff, and she arrived in England in February, 1855. Evidence was adduced on the part of the defendant to shew that the plaintiff was incompetent, negligent, and unskilful whilst in command of the vessel, and that he had not carried on the trading operations as he ought to have done. The plaintiff claimed his salary at the rate of 50*l.* a month, from the 1st December, 1853, to the 7th March, 1855, allowing 350*l.* paid on account; and he also claimed 250*l.* for commission.

It was objected on the part of the defendant, that this was a contract for service during the entire voyage, to be paid for at the rate of 50*l.* a month, and by 20 per cent. commission on the trading proceeds, and that as the plaintiff had abandoned the command of the vessel before the voyage was completed he was not entitled to recover anything. It

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was submitted on the part of the plaintiff, that he was entitled to recover as upon a quantum meruit. In answer to a question left by the learned Judge to the jury, they found that the plaintiff had abandoned the command of the vessel on the 17th August, 1854. The learned Judge expressed an opinion that the plaintiff was entitled to recover on a quantum meruit, and he left it to the jury to say what was a fair remuneration for the plaintiff's services. The jury found a verdict for the plaintiff on the indebitatus count with 322*l.* damages, allowing ten months salary, minus the 350*l.* paid on account, and 172*l.* for commission. The first issue was also found for the plaintiff; the second for the defendant; and leave was reserved to move to enter the verdict for him on the indebitatus count.

*Watson*, in the following term, obtained a rule nisi accordingly, on the ground that the plaintiff, not having performed the contract, and having abandoned the command of the vessel, was not entitled to recover on a quantum meruit; or for a new trial on the ground that the damages were excessive.

Sir *F. Thesiger* and *Maude* shewed cause in last Easter term (April 22).—The plaintiff, is entitled to retain the verdict. Some service was performed, and in respect of that the plaintiff may recover on a quantum meruit. As a general rule, where a party cannot recover a stipulated remuneration because he has not performed the entire work which was to be the consideration for it, still if the other party has derived any benefit from his services, the law implies a promise to pay so much as they are reasonably worth. That principle has been affirmed in several cases which are collected in the note to *Cutter v. Powell*, 2 Smith's Lead. Cas. 21. [*Pollock*, C.B.—Is not this an entire and indivisible contract for service during the whole of the

expedition, the payment to be calculated at the rate of 50*l.* a month.] It is a contract by the month. In *Hartley v. Harman* (*a*), the plaintiff was hired as superintendent of works, his "salary to be at the rate of 150 guineas per annum," either party to have the option of determining the engagement by a month's notice. At the end of eighteen months the plaintiff was dismissed without notice or cause assigned, eighteen months' wages being then due to him, and it was held that he might recover eighteen months' wages under a count for work and labour. So here the plaintiff is entitled to retain the verdict for 50*l.* He acted in command of the vessel for eight months, and has only received payment for seven months' services. If the defendant has sustained any damage from the plaintiff having abandoned the command, that is the subject of a cross action.—(They also argued, upon the facts, that the plaintiff was entitled for commission, to the amount found by the jury, and that the damages were not excessive.)

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*Watson, Wilde, and Tomlinson*, in support of the rule.—This is a contract for service during the whole voyage; and the performance of the entire work is a condition precedent to the right to recover anything. The case is peculiar in this respect, that the remuneration extends over a period antecedent to the service, and even antecedent to the contract. According to the argument on the part of the plaintiff, if he had refused to go the voyage he might nevertheless have recovered for the time previous to the departure of the vessel. The plaintiff's abandonment of the command, when the important service commenced, caused an entire failure of consideration. The case is analogous to that of freight, which can only be recovered pro rata itineris, where from the circumstances a new contract may be

(*a*) 11 A. & E. 798.

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implied; *Vlierboom v. Chapman* (*a*). There is no authority for saying, that where a contract for service is entire, a party who has only performed a portion of it is entitled to payment. The case of a servant depends on this principle, that inasmuch as the service is homogeneous throughout the year, where there is a stipulation for monthly wages, if there has been a month's service there shall be a month's pay. The master does not lose the benefit of the service for one month, because he is deprived of the service in the following month. In this case the defendant is not entitled to one month's pay, because the defendant has not received one month's benefit. He would never have agreed to pay the plaintiff at the rate of 50*l.* a month if the latter had not agreed to go the whole voyage. The case is similar to that of a contract to make a perfect article for a certain sum of money, in which case, unless it is completed, the workman cannot recover either for the materials found or for the work done; *Sinclair v. Bowles* (*b*). Suppose a person employs another to paint a picture, and agrees to pay him 100*l.* a month so long as he is engaged upon it, could the latter, at the end of three months, leave the picture unfinished and recover 300*l.*? [*Alderson*, B.—Suppose the plaintiff had performed all the service except for the last few hours, is he to be paid nothing?] Where a contract is in its nature undivisible, there is no right to part payment. If the plaintiff could recover in this action, the defendant might recover back the money in an action against him for abandoning the command of the vessel. In *Lamburn v. Cruden* (*c*), *Tindal*, C. J., said, “No new contract arises by implication of law, upon a simple dissolution of a special contract of hiring and service, in respect of services performed under such special

(*a*) 13 M. & W. 230.

(*b*) 9 B. & C. 92.

(*c*) 2 Man. & G. 253.

contract previously to its being so dissolved ;" and à fortiori where the servant abandons the service without the leave of his master.—They also referred to *De Bernardy v. Harding* (a).

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*Cur. adv. vult.*

**POLLOCK, C. B.**—We are of opinion that the plaintiff is entitled to a verdict for 50*l.* on the first count, on the ground that the contract between the parties was for a monthly payment, that eight of those months had elapsed and only seven been paid for. In the defendant's letter to the plaintiff, he uses the expression, "Your pay to be at the *rate of 50*l.* per month.*" What would have been the effect of these words had they been unqualified and unexplained by anything subsequent, it is unnecessary to say, for in the plaintiff's answer he uses the expression, "pay of 50*l. per month.*" If this does not differ from the defendant's letter, it shews what it means; if it does, it is a new or counter offer by the plaintiff, and being accepted by the defendant, is the basis of the contract between them. Its terms, therefore, supersede or explain those of the previous letter of the defendant. There "per month" means "each month," or monthly; and gives a cause of action as each month accrues, which, once vested, is not subsequently lost or divested by the plaintiff's desertion or abandonment of his contract. The words are plain; and no mercantile man would doubt what was meant. But further, if this meaning is not given, the result would be, that had the plaintiff died, or the voyage failed at the last moment, nothing would be payable by the defendant, because, according to his contention, the performance of the entire work contracted for was a condition precedent to the right to receive anything. This cannot have been intended. It

(a) 8 Exch. 822.

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is said on the other hand, that if the plaintiff's construction prevails, he might stay in England three or four months, then refuse to go on the voyage, and claim to be paid for the months elapsed, and the defendant have no remedy but in a cross action. No doubt that would follow; but agreements should be construed as though made on the supposition that both parties would observe them, not break them; and on that supposition the plaintiff's construction is reasonable, and the defendant's is not. Further, the pleadings of both suppose a claim due, though only part of the work agreed to be done.

As to the other question, we think there was some evidence to go to the jury on behalf of the plaintiff; but we also think his damages on that should be nominal, or next to nominal. If he is content with this, then the verdict should stand for 50*l.*; if not, there should be a new trial.

Rule accordingly.



June 5.

REGINA v. SALTER.

Where the surety of a Crown debtor has paid the debt of his principal, an order that he shall be placed in the situation of the Crown, and a writ of extent be put in force in his behalf, is not absolute in the first instance, though notice of motion has been served on the principal and the Crown, and no one appears to oppose the application.

IN this case the defendant had become bound jointly with R. S. Parry and W. Pearce in a bond to secure sums payable to her Majesty for duties of excise on malt made by the defendant. On the 9th of September, 1852, there was due from the defendant the sum of 172*l*. 1*s.* 7*d.*, and a writ of extent issued out of this Court to recover the amount against the defendant. Previously to the 1st of April her Majesty had received the whole of the duties with the exception of 24*l*. 11*s.* On that day Parry and Pearce paid this sum to the officer of her Majesty's excise in discharge of the balance of the arrears of duties and the costs. Part of this sum, amounting to 97*l*. 11*s.* 10*d.*, was paid out of the proper monies of Parry and Pearce. It was stated that the defendant had

become bankrupt. Notice of motion had been served on the Crown, the defendant, and his assignees.

Kingdon, in Easter Term (April 25), moved on behalf of the sureties, Parry and Pearce, for an order that they should be placed in the situation of the Crown, and that the writ of extent, which had issued against the defendant, should be put in force on their behalf until they should have been reimbursed the sum paid by them in discharge of the said duties.—The sureties are anxious that an order absolute should be granted in the first instance. In *Regina v. Robinson* (a) no notice of the motion had been given to the defendant. Here the Crown, the defendant, and his assignees have been served, and no one appears to oppose the application.

Per CURIAM.—We can only grant an order nisi in the first instance. Counsel will then appear for the Crown and notify its consent.

Order accordingly; to be served on the
solicitor of Inland Revenue, the de-
fendant and his assignees.

The rule was now made absolute; counsel appearing on the part of the Crown, and consenting.

(a) REGINA v. HENRY ROBINSON.

WATSON, in Easter Term (May 1, 1855), moved that James Robinson, a surety, who had paid the debt of the defendant to the Crown, should be placed in the situation of the Crown; and that a writ of extent, which had issued against the defendant, might be put in force in his behalf.

It appeared from the affidavit of James Robinson, that he was one of the sureties in a bond to her Majesty in the penal sum of 950*l.* to secure monies payable for duties of excise on malt made by the defendant; that on the 16th of April, 1855, there was due from the defendant 699*l.* for duties on malt, and on that day his goods were seized under a warrant issued by two justices of the peace for levying

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the said duties, and on the following day a writ of extent was issued out of this Court against the defendant for recovering the said duties; that the writ of extent had not been put in force, but that the said goods and chattels had been sold under the warrant for the sum of 546*l.* or thereabouts; that James Robinson had since paid to the officer of her Majesty's excise the sum of 200*l.* in discharge of the balance of the arrears of duties due from the defendant to her Majesty, and the expences incurred by the Crown; that he was informed that the Crown had no further claim on him or the defendant; that he was desirous that the writ of extent should be put in force in his behalf to reimburse him the sum of 200*l.*: and that he believed that there were book debts amounting to 200*l.* and upwards due to the defendant. Notice of motion had been served on the solicitor to her Majesty's Inland Revenue, Excise Department, and a consent had been indorsed thereon as follows:—"There is no objection to this motion on the part of the Crown.

" HUGH TILSLEY,  
 " Assistant Solicitor of Inland Revenue."

*Watson*, in support of his motion.—It is the practice of the Court of Exchequer, where a surety pays the debt due from any defaulter to the Crown, to allow him to stand in the place of the Crown, and to give him the benefit of the prerogative process against the principal. This is not an extent in aid (*a*). A surety who pays the debt of his principal is entitled to an assignment of the securities for the debt. The practice was stated by the Court in *The King v. Bennett* (*b*). That case shews that the debt to the Crown is not extinguished. *Reg. v. Doughty* (*c*) is a case where the sureties of a bond, having paid the bond debts to the Crown, got the benefit of the bond. *Rex v. Webber* (*d*) is to the same effect. [Parke, B.—In *Copis v. Middleton* (*e*), Lord Eldon said that he took it to be clear, "that if at the time a bond is given a mortgage is made also for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, and as the mortgagee cannot get back his estate without a conveyance, that security remains a valid and effectual security notwithstanding the bond debt is paid; but if there is nothing but the bond, my notion is, that, as the law says that bond is discharged by the payment of what was due upon it, the bond is gone and cannot

(*a*) See as to this *Rex* (in aid of) *Hollis v. Bingham*, 1 Cr. & M. 862; S. C. 2 C. & J. 130; 57 Geo. 3, c. 117.

(*b*) *Wightwick*, 1.  
 (*c*) *Wightwick*, 2, note.  
 (*d*) *Wightwick*, 3, note.  
 (*e*) 1 *Turn. & Russ.* 229.

be set up." That case decided that the surety does not become a specialty creditor, and therefore it cannot be said that he is entitled to all the creditor's rights. The cases in Wightwick occurred before the decision in *Copis v. Middleton*.] It is the constant practice for a surety paying a debt to take an assignment of a judgment (a). [Parke, B.—In the present case the extent did not go upon the bond].

Per CURIAM.—Take an order nisi to be served on the defendant and the Crown.

The order as drawn up was, "that her Majesty's Attorney General and the defendant Henry Robinson do within a week from the service of this order, or a copy thereof, shew cause to this Court why the said James Robinson should not be placed in the situation of the Crown, and the said writ of extent so issued against the said Henry Robinson as aforesaid be put in force on his behalf, until he shall be reimbursed the said sum of two hundred pounds so paid by him as one of the sureties of the said defendant as aforesaid; and also all costs and expences incurred by him in relation to this application and to the said extent. And it is further ordered that service of the order on the solicitor of inland revenue be deemed good service on her Majesty's Attorney General."

Afterwards, in Trinity Term (May 25), Wilde, as counsel for the Crown, appearing, and not opposing, and on an affidavit of the service of the order on the defendant, the order was made absolute *except as to the costs and expences mentioned therein* (b).

(a) He cited Anon. Sav. 52, on Principal and Surety, 352; pl. 111. See further West on *Whitehouse v. Partridge*, 3 Swanst. Extents, 307; Manning's Exchequer Practice, Revenue Branch, 71; Anon. Sav. 30, pl. 72; Burge 365, 376.  
(b) See *Rex (in aid of Hollis) v. Bingham*, 1 C. & J. 379.

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June 11.

Where a defendant makes default in pleading to an assignment of error coram vobis to reverse an outlawry, the rule for judgment of reversal is absolute in the first instance.

**ARDING v. HOLMER.**

**I**N this case the plaintiff had sued out a writ of error coram vobis to reverse an outlawry, on the ground that he was beyond the seas at the time of the award of the ex*ig*i facias (*a*). The defendant having made default in pleading to the assignment of error,

*Lush* now moved for judgment of reversal of the outlawry.—The only question is, whether the rule can be made absolute in the first instance. In *Howard v. Kershaw* (*b*) the Court granted a rule nisi only. [*Martin, B.*—I should have thought that the rule was absolute in the first instance.] Unless that course is adopted on the present occasion, the defendant will not be able to get released from the outlawry until the ensuing Michaelmas term.

**Per CURIAM.**—The rule may be absolute.

Rule absolute.

(*a*) See the case, *ante*, p. 85.

(*b*) 6 Exch. 541.

June 10.**LYNE and Another v. SIESFELD.**

In an action for money paid, &c., the defendant pleaded that the money was

**D**EBT for money paid, work done, and brokerage and commission in respect thereof, &c.

**P**leas:—First, never indebted: Secondly, that the money

paid, &c., for and in respect of certain differences which the plaintiffs, as the defendant's brokers, contracted to pay for them on account of certain unlawful contracts, by way of gaming and wagering, relating to the public funds, and to railways and shares in railways, and to the then present and future prices thereof respectively; and in lieu of, and instead of making, accepting, and paying for transfer thereof, partly contrary to the 7 Geo. 2, c. 8, and partly contrary to 8 & 9 Vict. c. 109.

*Held*, that the plea being no answer as to the money paid in respect of losses on the sale of shares was bad altogether, and was not made good as to the money paid in respect of losses on sales of consols, by the 75th section of the Common Law Procedure Act, 1852.

in the declaration mentioned to have been paid, and the work to have been done, and the brokerage and commission therein mentioned, &c., were so respectively paid, done, and became payable after the passing and coming into force of, and partly contrary to an Act (7 Geo. 2, c. 8, the Stock Jobbing Act), and after the passing and coming into force of, and partly contrary to another Act (8 & 9 Vict. c. 109, concerning Games and Wagers); and that the monies in the declaration mentioned to have been paid were so paid for and in respect and on account of certain differences and monies which the plaintiffs as the defendant's brokers and agents in that behalf, after the passing and coming into force of the said Acts, unlawfully contracted and agreed with divers persons to pay them for and on account of the defendant, upon and for and on account and in respect of certain unlawful contracts and agreements, made and entered into by the plaintiffs as the brokers and agents of the defendant in that behalf, on his account, after the passing and coming into force of the said Acts, by way of gaming and wagering, and in the nature of wagers touching and relating to the public funds, public stock, joint stock, and other public securities of this realm, and to railways and to shares in railways in the kingdom of Great Britain and Ireland, and to the then present or future prices thereof respectively, and in lieu and instead of making, accepting, and paying for transfers thereof, by, to, and from the defendant, contrary to the said statutes; and that the said work done was so done by the plaintiffs, as the brokers and agents of the defendant, after the passing and coming into force of the said Acts, and about the making, entering into, and effecting the said illegal contracts and agreements, so as aforesaid made and entered into and effected by the plaintiffs, as the brokers and agents of the

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defendant in that behalf, and on his account, by way of gaming and wagering, and in the nature of wagers, touching and relating to the matters aforesaid, contrary to the said statutes; and that the said brokerage and commission in the said declaration mentioned was and is certain brokerage and commission claimed to be payable by the defendant to the plaintiff upon, for and in respect of the doing of the said illegal work and labour, so done by the plaintiffs as the defendant's said brokers and agents, in making, and entering into, and effecting the said illegal contracts and agreements, and not otherwise, &c.—Issues thereon.

At the trial, before *Platt*, B., at the Sittings in London after last Michaelmas Term, a verdict was found for the defendant on the second plea.

Pickering, in Hilary Term, obtained a rule to shew cause why judgment should not be entered for the plaintiff non obstante veredicto.

M. Chambers and *Petersdorff* shewed cause (June 3) (a).—The plea sets up one entire illegal and void contract, partly contrary to the Stockjobbing Act and partly contrary to the Gaming Act. [*Martin*, B.—It is a bad plea so far as regards the money paid in respect of the loss on the Caledonian shares (b). It is consistent with the allegations in the plea, that after the loss occurred, the defendant went to the plaintiffs and requested them to pay for him the loss on the purchase of the Caledonian shares. The defences are several and distinct, and should have been pleaded in separate pleas. As the plea stands, it is incumbent on the defendant to make

(a) Before *Pollock*, C. B., and *Cambers*, 15 C. B. 562; *Knight* *Martin*, B. v. *Fitch*, 15 C. B. 566, and *Jes-*

(b) On this point see *Fitch v. Fopp* v. *Lutwyche*, 10 Exch. 614; *Jones*, 5 E. & B. 238. *Knight v. Hewitt* v. *Price*, 4 M. & G. 355.

out that it is good as to both the contracts.] The plea on the face of it is good. The consideration for the promise is entire, and in part illegal.

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Pickering and *Hawkins*, in support of the rule.—The plea is bad in part, and is therefore bad altogether: *Webb v. Martin* (*a*). The plea cannot be construed distributively and treated as a defence in part. This is not a case to which the 75th section of the Common Law Procedure Act was meant to apply: *Gabriel v. Dresser* (*b*).

Cur. adv. vult.

POLLOCK, C. B., now said.—We are of opinion that this plea is bad. The causes of action to which it is pleaded are founded on distinct considerations. To shew that one is illegal does not afford an answer to the whole of that to which the plea is pleaded. There must be judgment for the plaintiff non obstante veredicto.

Rule absolute.

- (*a*) 1 Lev. 48. *Wilkinson v. Kirby*, 15 C. B. 430;
 (*b*) 15 C. B. 622. See also *Chappell v. Davidson*, 18 C.B. 194.

MEMORANDUM.

In the present Term *William Ballantine*, Esq., of the Inner Temple, and *John Humffreys Parry*, Esq., of the Middle Temple, were respectively called to the degree of the coif, and gave rings, the former with the motto “*Jacta est alea*,” the latter “*Spe et fide*.”

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TRINITY VACATION, 20 VICT.

June 28.

MUGGLETON v. JOSEPH BARNETT and Another.

In ejectment for copyhold premises, the plaintiff claimed as customary heir in Borough English of E. M., who purchased the premises in 1772. Upon the death of E. M. in 1812, the premises descended to his two infant granddaughters, as coparceners. One of them died unmarried, and was succeeded in her moiety by her sister, who, in 1836, married the defendant. She died in 1838, leaving one son, to whom the premises descended, and who died in 1854, without issue, and was the

person last seized. It was proved, that lands in the manor descended lineally to the youngest son of the person last seized ad infinitum, and if no son to the daughters as coparceners; if no lineal heirs to the youngest brother of the person last seized, and to the youngest son of such youngest brother, and if the youngest brother died without issue, to the next youngest brother; and if no brother then among the sisters as coparceners. There was also an entry of descent, and admission of the youngest son of an uncle, and of the youngest sons respectively of two sisters, heirs of the person last seized. The plaintiff was the youngest son of the youngest brother of E. M. the purchaser.

Held, that the custom did not extend to so remote a collateral relation as the plaintiff: Per Pollock, C. B., and Martin, B., (*Brewsewell*, B., dissentiente).

custom of descent was proved to be, that the land descended to the youngest son of the person last seised, if he had more than one; and if such youngest son were dead without issue, to the next youngest son; or if no other son, to daughters as parceners; and if no issue, then to the youngest brother (if more than one) of the person last seised, and to the youngest son (if more than one) of such youngest brother; in case such youngest brother were dead without issue, to the next youngest brother, and if no brother then among the sisters as parceners.

There is no customary or formal record upon the rolls of the Court of the custom of the manor with respect to descents, but the custom was proved by numerous entries of admission upon the rolls of the manor from the year 1648 (the earliest of the existing rolls) down to the present time. In later times, indeed, there appear several entries of elder brothers as heirs, between the years 1825 and the present time; but the great preponderance of entries was in favour of the special mode of descent above mentioned; and the learned Judge expressly found the custom to the extent hereinafter stated, but subject to the question herein-after mentioned with respect to the extension of the principle of descent to remote collateral relations.

It was proved at the trial that Bryan Barnett, the person last entitled to the said copyhold premises, died without issue, and his great grandfather, Edward Muggleton, was purchaser of the said premises, having bought them in 1772, and having been duly admitted thereto. Upon the death of the said Edward Muggleton in 1812, the premises descended to Elizabeth Jane Muggleton and Rebecca Muggleton, the two infant daughters of his only son Edward Muggleton, who died in his father's lifetime. The said Elizabeth Jane Muggleton and Rebecca Muggleton were duly admitted tenants in respect thereof, in the year 1827, as co-heiresses

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to their grandfather; and the said Rebecca Muggleton dying in the year 1828, a minor, intestate and unmarried, was succeeded in her moiety as heir by her sister Elizabeth Jane, who in the year 1836 married the defendant, Joseph Barnett. Upon her death in 1838, the said Bryan Barnett succeeded to the said premises as heir to his mother, being the only child of the marriage, and died in possession of the premises in 1854, but without having been admitted and without issue. Upon his death all the lineal descendants of his great grandfather, the said Edward Muggleton, became extinct.

The defendant did not prove the existence of any custom in the said manor of tenancy by courtesy.

The plaintiff was the youngest son of the youngest brother, Peter, who died in 1797, of the said great grandfather, Edward Muggleton, who died seised in 1812. There were several other brothers of the great grandfather, Edward Muggleton, and of the plaintiff's father, one of whom at least left issue living at the date of writ; and there had been also an elder brother of the plaintiff, but he was dead before the date of the writ, leaving issue; but the plaintiff claimed as the youngest son of the youngest brother of the great grandfather Edward Muggleton.

In addition to the entries on the rolls, which established the custom of descent in the manor to the extent above stated, there was one entry of descent and admission in favour of the youngest of the uncles of the person last seised, and one entry of descent and admission shewing the descent to the youngest sons respectively of two sisters who were heirs, parceners, to the person last seised; and the learned Judge was of opinion, and directed that these entries were sufficient to establish that the custom of the manor extended so far as is shewn by the above last mentioned entries; but there were no instances on the

rolls in which the custom had been extended to more remote collateral relations than those above specified. The plaintiff contended that the above instances were sufficient evidence to shew that the custom extended to the plaintiff as the youngest son of the youngest brother of the said great grandfather of Bryan Barnett. The defendant contended that there was no evidence to authorize an extension of the custom of descent in favour of so remote a collateral relative of the said Bryan Barnett.

The learned Judge decided the case in favour of the plaintiff upon the above question, subject to the opinion of the Court on this case. The question for the Court to decide is whether, under the circumstances above stated, the plaintiff is entitled to recover in the action. If the Court shall be of that opinion the verdict is to stand; but if not, a verdict for the defendant or nonsuit is to be entered.

Mundell argued for the plaintiff (June 6). — The case involves two points—first, whether there is any evidence that the custom extends to so remote a collateral relation as the plaintiff; and secondly, whether the plaintiff is not entitled to recover as the customary heir of the purchaser, Edward Muggleton. First, a custom is found which excludes all those who would otherwise claim collaterally in the second degree, that is, in the descending line; and therefore, as regards the question of representation, there is no difficulty; because the case finds that the youngest son of the youngest brother may inherit. In considering this question, it is important to bear in mind that at the time of the Conquest all lands were of Gavelkind tenure, quoad inheritance; though Lord *Coke* seems to have been of a different opinion; *Clements v. Scudamore* (a); *Blackborough v. Davis* (b).

(a) 1 P. Wms. 63.

(b) 1 P. Wms. 41.

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Littleton says (s. 165) :—“ Some boroughs have such a custom, that if a man have issue many sons and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father, by force of the custom, the which is called Burrough English.” And Lord *Coke*, in his comment on that passage (Co. Lit. 110 b), says,—“ And yet by some customs the youngest brother should inherit, for consuetudo loci est observanda.” The custom has altered the mode of descent, but the right of representation remains as at common law. There is no difference between the custom of Gavelkind and Borough English, except in the quantity of land which the heir takes; *Clements v. Scudamore* (a). It will be argued that there is a distinction as regards the right of collaterals, but that position is not warranted by the authorities. The earliest case is *Ratcliffe and Chaplin's case* (b), the report of which in Leonard does not shew the precise point before the Court, but it is thus stated by *Dancy* in *Chapman's case* (c),—“ Fuit un custom in Coppihold que si home ad coppie in fee, et morust aiant issue 3 files, que le eigne avera tout: et le case fuit, purchasor de Coppihold morust sans issue aiant plusers soers, et ajudge que touts averont in coparcenary, car le custom solement al files.” According to the report in Leonard, *Ratcliffe and Chaplin's case* was an ejectment, and upon not guilty pleaded the plaintiff proved by witnesses “that the eldest heir, be it male or female, should inherit the land,” and by entries on the Court rolls “that the eldest sister ought to inherit, and that the youngest sister should have nothing in the land;” the defendant gave in evidence divers entries on the Court rolls, and especially one “that both sisters shall inherit as coparceners did by the common law:”

(a) 1 P. Wms. 63.

(b) 4 Leon. 242.

(c) 2 Roll Rep. 369.

the jury found for the custom, in regard they, upon their own knowledge, knew the usage of the country, and that in divers places it had been so used in the hundred within which this manor was. But it was agreed by the Court "that if the custom had been that the eldest sister only should inherit, yet by that custom the eldest aunt, or the eldest niece, should not inherit the land: and so it is in the case of *Borough English*, where the custom is that the youngest son shall have the land, it doth not give it to the youngest uncle, for customs shall be taken strictly. And *Foster*, J., said that so it was adjudged in one *Totnam's case*. And in the course of the argument Lord *Coke* said, "that upon the evidence given to the jury, the Court enforced the parties which maintained the custom to shew precedents in the Court rolls to prove the usage, and he said that without such proof, and that it had been put in ure, although it had been deemed and reputed to have been the true custom, yet the Court could not give credit to the proof by witnesses." But that case only decides that there must be evidence that the custom exists among collaterals, and that the custom being in derogation of Gavelkind and the feudal law must be construed strictly. Moreover, that case has not met with universal approbation. In *Roe d. Beebee v. Parker* (a), *Grose*, J., says, "The dictum of Lord *Coke* in the case in *Leonard* has, however, been cited to shew that this is not evidence. It must be remembered that there are considerable inaccuracies in the report of that case; and I think that Lord *Coke* meant to comment on the *credit* which was due to the evidence rather than to its *admissibility*." Here there is evidence that the custom extends to remote collateral relations. The right to inherit amongst males of an equal degree is invariably confined to the youngest, and when it is once shewn that a youngest collateral male may take, the presumption arises that all, in any degree however remote,

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are equally entitled. The evidence not only shews a right of representation in collaterals, but also a preference for the youngest of the male stock, when they come in by right of representation, to parceners; and when the common ancestor is the grandfather the custom is expressly found. Whether a custom of this kind should be extended was considered in *Doe. d. Foster v. Sisson* (*a*), where it was held that evidence of reputation of the custom of a manor,—that in default of sons, the eldest daughter, and in default also of daughters, the eldest sister, and in case of the death of all, the descendants of the eldest daughter or sister respectively of the person last seised, should take,—is proper to be left to the jury of the existence of such a custom as applied to a great nephew (the grandson of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no further than those of eldest daughter and eldest sister, and the son of an eldest sister. There Lord *Ellenborough*, C. J., said,—“Though this reputation in its generality went beyond the particular instances proved in which the custom had been put in use, (which however was established not only in the case of the eldest sister's taking, but also of the eldest sister's son taking, upon the death of the tenant last seised); yet, how can we say that it was not evidence to go to the jury, (which is the question we are now to decide), of the larger custom, of which the particular instances proved were only so many branches derived from the same root?” Reliance is placed on the authority of Com. Dig. tit. “Burrough English,” where it is said, “But these customs shall be taken strictly; and therefore the custom of Burrough English does not extend to the youngest brother, without a special custom, 2 Cro. 198, Cro. Car. 411, 1 Rol. 623, l. 42. Nor a custom for the youngest brother, daughter, sister, &c.,

(*a*) 12 East, 62.

extend to an aunt, &c., 1 Rol. 623, l. 40, 4 Leo. 242, Godb. 166; or a niece, 4 Leo. 242. So, if there be a custom, that a descent shall be to the youngest son, and he dies in the life of his father, the descent shall not go to his issue without a special custom. Court divided. Jon. 362. R. Contra, 1 Sal. 243, Mod. Ca. 120." But that only applies to cases where there is no evidence that the custom extends to remote collaterals. In *Reeve v. Malster* (*a*), a tenant of a manor being seised in fee of a copyhold, which by the custom of the manor descended to the youngest son of the tenant dying seised, according to the nature of Borough English, surrendered this copyhold to the use of himself and his wife and his heirs. He afterwards died leaving issue three sons. The youngest son died in the lifetime of his mother without issue, and then the mother died, and the question was, whether the eldest or middle son should inherit. *Brampton*, C. B., and *Berkeley*, J., were of opinion that the middle son ought to have the land, as if the youngest son had never been; for he shall make title from his father. But *Jones*, J., and *Croke*, J., held that the eldest son had better title, for the youngest son being the heir in whom the copyhold vested at the death of his father, the custom had its operation and was at an end. *Holt*, J., in delivering the judgment of the Court in *Clements v. Scudamore* (*b*), approves of the opinion of *Brampton*, J., and *Berkeley*, J., and he says, that "this custom is not to be taken strictly and according to the letter, but shall receive such construction as may comprehend necessary consequences and incidents in course of descents." In *Locke v. Colman* (*c*), the custom was, that, on the death of a person seised of property within the manor, leaving no

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- (*a*) W. Jones, 361; Cro. Car. 1 Salk. 243.  
 410; 1 Roll. Abr. 624, pl. 1. (*c*) 1 Myl. & C. 423.  
 (*b*) 1 P. Wms. 63; 6 Mod. 120;

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widow, child, or brother, the youngest sister shall inherit, and that was held not to exclude the issue of a deceased brother. Sir *John Savage's case* (*a*), which was considered an authority that customs of this kind must be construed strictly, has been overruled by *Doe d. Milner v. Brightwen* (*b*) . The case of *Doe d. Hamilton v. Clift* (*c*), has no bearing on this case, because there the entries on the roll supported the custom to the extent claimed. The rules of the common law may be called in aid. In Black. Com. vol. 2, p. 223, the learned author after stating the canons of descent says,—“ This is the great and general principle upon which the law of collateral inheritance depends; that upon failure of issue and lineal ancestors in the last proprietor, the estate shall descend to the blood of the purchaser; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have, originally descended.”

Secondly, the plaintiff is entitled to recover, as the customary heir of the purchaser, Edward Muggleton. This question depends on the construction of the Inheritance Act, 3 & 4 Wm. 4, c. 106. By the interpretation clause (sect. 1), "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent. The 2nd section enacts, "That in every case descent shall be traced from the purchaser," &c., "and that the person last entitled to the land shall, for the purposes of that Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited," &c.; therefore succession *in stirpes* is abolished, and the "purchaser" is substituted for the person

(a) 2 Leon. 109. 208, nom.      (b) 10 East, 583.  
*Beale and Langley's case.*      (c) 12 A. & E. 566.

last seised; *Doe d. Blackburn v. Blackburn* (*a*); Sugden's Vend. and Purch. p. 549, 11th ed. The custom equally applies to that mode of tracing the descent.—He also cited *Byth. and Jar. Convey.*, by Sweet, vol. 1, p. 139, 3rd ed., and *Cooper v. France* (*b*).

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*Hayes*, Serjt., for the defendant.—As a general rule, where the customary descent is different from that by the common law, it must be construed strictly: *Cruise Dig.* tit. xxix. c. 5, s. 32; *Pain v. Herbert* (*c*). There are no entries on the Court rolls of the custom relied on, and it cannot be inferred from a custom for the youngest son or youngest brother to inherit, that the youngest remote collateral relation may also inherit. [*Martin*, B.—In *Les Termes de la Ley*, tit. “Borow English,” it is said, “Borow English is a customary descent of lands or tenements in some places, whereby they come to the youngest son, or if the owner have no issue to his youngest brother, as in *Edmunton, Kitchin.* f. 102” (*d*).] In *Bayly v. Stevens* (*e*), it was resolved by the Court, “that where land in Borough English descends to the youngest son and he dies without issue, it shall not go to the youngest brother; for the custom doth not hold place betwixt brothers without a particular custom, but the eldest brother shall have it.” Littleton also describes the custom of Borough English as limited to the youngest son: sect. 165. [*Bramwell*, B.—The reason given by

(*a*) 1 Moo. & R. 547.

(*b*) 19 L. J. Chan. 313.

(*c*) Cited in *Newton v. Shafloe*, 2 Keb. 158, and *Clements v. Scudamore*, 1 P. Wms. 63.

(*d*) In the same book, tit. Burgh English, “it is said Burgh English or Borough English is a custom in some ancient borough, that if a man hath issue divers

sons and dies, yet the youngest son only shall inherit and have all the lands and tenements that were his father's, whereof he died seised within the same borough, by descent, as heir to his father by force of the custom of the said borough.”

(*e*) Cro. Jac. 198.

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Littleton for the custom (sect. 211), "because that the younger son (if he lack father and mother) because of his younger age may least of all his brethren help himself," will not apply to the youngest brother.] In Robinson on Gavelkind (*a*), that is stated to be the true reason. *Reeve v. Malster* (*b*), and *Clements v. Scudamore* (*c*), are authorities that the custom of Borough English applies only to lineal descendants, and that any special custom extending it to collaterals must be strictly proved. Lord Holt, in his judgment in *Clements v. Scudamore*, refers to a case of *Hale v. ——*, where the custom of the manor was that the copyhold lands of every tenant dying *seised* descended to the younger son. A surrender was made to the use of B. and his heirs, who died before admittance. It was agreed, that if B. had been admitted, after his death the youngest son should have inherited; but dying before admittance, the question was between the eldest and the youngest son of B., who should have the land: and it was adjudged that the eldest son should in this case inherit, because of the straitness of the custom, there never having been any seisin in the ancestor. In Cruise's Dig. tit. xxix. c. 5, s. 34, it is said—"If a custom be alleged that the eldest daughter shall solely inherit, the eldest sister shall not inherit by force of that custom. So if the custom be that the eldest daughter and the eldest sister shall inherit, the eldest aunt shall not inherit. So if the custom be that the youngest son shall inherit, the younger brother shall not inherit." In *Denn d. Goodwin v. Spray* (*d*), the custom was that lands were descendible to the eldest sister when there was neither son nor daughter; and the Court said that as there was no proof on the Court rolls of the course of succession in the collateral

(*a*) Appendix, p. 388, 3rd ed.(*c*) 1 P. Wms. 63; 1 Salk. 243;(*b*) Cro. Car. 410; W. Jones, 6 Mod. 120.

361.

(*d*) 1 T. R. 466.

line further than the case of a sister, it followed that the copyhold in question did not go to the youngest niece. This case is not distinguishable from that. In *Roe d. Beebee v. Parker* (*a*), and *Doe d. Foster v. Sisson* (*b*), there was evidence of the mode of descent relied on.

Secondly; the only alteration made by the 3 & 4 Wm. 4, c. 106, is, that in tracing the descent, the "purchaser" is substituted for the person last seised, and title may be made through him, though he has not entered: *Doe d. Hamilton v. Clift* (*c*). The custom is limited in the same manner as before that Act.

*Mundell*, in reply.—This is not a feudal tenure, but a tenure in socage; and the custom is arbitrary, depending on the will of the lord. *Clements v. Scudamore* shews that such a custom is not to be construed strictly. In *Denn d. Goodwin v. Spray*, the custom was that lands should descend to the elder sister where there was neither son, daughter, nor brother; therefore the custom was limited to the immediate heirs of the person last seised; for a sister is immediate heir to her brother: *Collingwood v. Pace* (*d*). But it was sought to extend that custom to a person who was not immediate heir, but claimed through a common ancestor, namely, a daughter of the eldest brother of the person last seised. By the 3 & 4 Wm. 4, c. 106, "descent" shall mean the title to inherit land by reason of a consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue." The heir must be traced from the purchaser, and throughout the youngest relations are to be preferred.

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*Cur. adv. vult.*

The Court now delivered judgment.

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| (a) 5 T. R. 26.<br>(c) 12 A. & E. 566. | (b) 12 East, 62.<br>(d) 1 Vent. 413. |
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MARTIN, B.—This is an action of ejectment, which, by consent of the parties, was tried before my brother *Willes* at the last Rutland Assizes. The plaintiff claimed as heir in Borough English of some copyhold property in the manor of Lydington-cum-Caldecott, in the county of Rutland. The property had originally been purchased in 1772 by Edward Muggleton, the great grandfather of the person who died last seised. He died in 1812, and the property descended to his two infant grand-daughters as coparceners. One of them died unmarried, and her share went to her sister, who died in 1838, leaving one son, to whom the property descended, and who died in 1854 without issue, and was the person last seised. The plaintiff is the youngest son of the youngest brother of the first purchaser, Edward Muggleton; his father therefore was, or would have been, (had he been alive), the great-great-uncle of the person last seised. It was proved that there were descendants of elder brothers of the first purchaser alive at the time of bringing the ejectment, who would therefore have a preferable title to the plaintiff, unless the custom prevailed.

To prove the custom, the plaintiff proved that the lands in the manor descended lineally to the youngest son of the person last seised in infinitum, and if no son to the daughters as parceners. He also proved instances, that if there were no lineal heirs the youngest brother took and the youngest son of the youngest brother; and if the youngest brother died without issue, the next youngest brother took; and if no brother, then sisters as parceners. He also proved instances in which the youngest son of an uncle took, and the youngest sons of two sisters, who were coparceners, respectively took. From this evidence the learned Judge drew the conclusion that the custom existed generally amongst all collaterals, and decided in favour of the plain-

tiff, subject to the opinion of this Court upon a case stating the above facts. If the case were new, I own that I should arrive at the same conclusion as the learned Judge. I concur with what was said by Sir Samuel Romilly in his argument in *Doe d. Denn v. Spray* (a), that if such evidence does not prove the custom generally amongst collaterals, it amounts to an impossibility to prove it at all; but it seems to me that the authorities are too strong to be got over, at least by this Court.

The 165th section in Littleton states thus:—"Some boroughs have such a custom, that if a man have issue many sons and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough as heir unto his father by force of the custom which is called 'Borough English.'" Lord Coke, in his Commentary on the section (110 b) says, "by the same custom the youngest brother shall inherit;" and in a note by Mr. Hargrave, it seems to be considered that the extension of Borough English to the collateral line is beyond the custom of Borough English properly so called. In section 211, Lyttleton again states the custom as being to sons, and gives a reason for it that "the youngest son may least of all his brothers help himself, which reason certainly does not extend to collaterals." In the "Termes de la Ley," Borough English is defined to be "a customary descent of lands or tenements in some places whereby they come to the youngest son, or if the owner have no issue to the youngest brother." This would seem to extend the custom properly so called to a collateral; but Lord Chief Baron Comyns, in Dig. tit. "Borough-English," lays it down that the custom does not extend to the youngest brother without a special custom; and he adds, that such customs are to be taken strictly, and that a custom for the youngest

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brother or sister does not extend to an aunt or niece; and if the custom for a sister does not extend to an aunt, it is difficult to say that the custom for an uncle extends to a great-great-uncle. This view of the very strict nature of the custom was adopted by the Court of King's Bench in *Denn v. Spray*, above cited. Several cases were cited on behalf of the plaintiff; one of them, *Locke v. Colman* (*a*), seems to confirm the strict view in which this custom was looked at in the law; the others do not seem to affect the question. It seems to me therefore that the case is settled by authorities which a Court of error alone is competent to overrule, if they are to be overruled. As I have already said, if I were to decide upon the case in the absence of authority, I should coincide in the judgment of my brother *Willis*.

I should observe that this is solely my judgment, and that the Lord Chief Baron goes further, and is of opinion that the custom is to be taken most strictly.

BRAMWELL, B., said.—I am unable to concur in the opinion which has been expressed. I agree with my brother *Martin*, that if this matter is considered *res integra*, the plaintiff would be entitled to judgment, but I think that the authorities are not such as to prevent us from now giving judgment in his favour. I am bound, therefore, shortly to state my reasons for that opinion.

We are called on to ascertain what the custom *is* in the manor in question. Now I fully agree, that if it were proved that the custom prevailed to a certain extent, as upon a special verdict, we should have no right to extend the custom beyond the actual proof; but the question we have to determine is, what *is* the custom? A variety of instances were proved in which the nearest youngest

(*a*) 1 Myl. & C. 423.

male relative of the person last seised took; and may we not infer from thence, that there is within the manor this canon or principle of descent, that the nearest youngest male relative shall invariably be found out? It appears to me, that we must either look at the actual instances of succession proved, as arising from some original arbitrary rule of those who had the power of determining the right of succession in that manor; or we must refer them to some general rule depending on principle. It seems to me more natural and more logical to attribute them to a rule of general application depending on principle, than to a mere arbitrary rule; and to say that the founder of the rule of descent in the manor determined, not merely that the youngest son should take, and failing sons the youngest brother, and failing sons and brothers the youngest uncle, and failing sons, brothers, and uncles the youngest sons of the youngest uncles, but that also in all other cases the same rule of descent should prevail. I understand my brother *Martin* to be of that opinion; but he thinks that the authorities are too strong to be got over. If there was a case in point, I should acquiesce in it, because I think it is extremely inconvenient that Courts of co-ordinate jurisdiction should differ, instead of referring the matter to a Court of appeal. The principal case relied on, is that of *Denn v. Spray* (*a*). With respect to that case, I cannot help observing in the first place, that though it came before the Court, not upon a special verdict but on a special case, so that the Court might have drawn inferences (though, perhaps, not very extensive ones, according to the notion of those days), yet they decided the case on the authority of *Ratcliffe v. Chapman* (*b*), which was a special verdict where the jury had actually found the custom to a certain extent, and the question was, whether on that

(*a*) 1 T. B. 466.

(*b*) 4 Leon. 242.

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special verdict the Court could extend the custom to something not within the terms of the exact finding? They could not, on any principle, do that. In *Denn v. Spray*, the Court do not seem to have adverted to that distinction. However, it is not necessary to say that *Denn v. Spray* is not law, and for this reason:—I have already stated that I think we are warranted in ascertaining a principle, and that by the process of induction, we may infer as the principle which governs the rule or canon of descent in this manor, that the nearest youngest male relative must always be sought for. Now in the case of *Denn v. Spray*, the evidence was, that the eldest daughter took to the exclusion of other daughters where there was no son; that the eldest sister took to the exclusion of other sisters where there was no son, no daughter, and no brother; and it was sought to extend that custom to an eldest niece. Now let us see what is the rule or canon of descent which might in that case be legitimately inferred from those instances. You have no right to infer from ascertained effects a cause more than enough to produce them. Then it seems to me that all which could be inferred from those two instances would be, that the rule or canon of descent in that manor was, that where there was no *immediate* male heir to the person last seised, and there was an *immediate* female heir, she took to the exclusion of those who would otherwise have been partners; because, it will be observed, as was mentioned in the able argument of Mr. Mundell, that a daughter is immediate heir to her father, and a sister is immediate heir to her brother. That will be found laid down in *Collingwood v. Pace* (a). In Stewart's Black. Com. vol. 2, p. 250, the learned editor, speaking of Lord Coke's opinion that the sons of an alien, though natural born

(a) 1 Vent. 413.

subjects, cannot inherit to each other, says, "But this opinion has since been overruled, and it is now held for law that the sons of an alien, born here, may inherit to each other, the descent from one brother to another being an immediate descent by the former law." Therefore the instances where the eldest female had taken to the exclusion of others, were instances of a daughter and sister who were immediate heirs to the person last seised, and not claiming through a common ancestor; but the attempt in the case of *Denn v. Spray* was to extend the custom to a female who was not immediate heir to the person last seised, but who claimed relationship to him through a common ancestor. Then, according to the principles which I have ventured to suggest, that decision is right, for the evidence being that the custom gave an exclusive right to one of several, who would otherwise have been parceners, where they were *immediate* heirs to the party last seised, you could not infer from that any principle which would extend the custom to the case of a female, who was one of several parceners *not immediate* heirs to the person last seised, but claiming through a common ancestor. It therefore appears to me, that we may hold that the case of *Denn v. Spray* to be rightly decided, and yet it is no authority for the decision which my brother *Martin* says that he has been compelled to come to. With respect to the authorities in Comyns' Digest, tit. "Borough English," I have examined them with attention, and they appear to me consistent with what I am now stating. Upon these grounds I think that we may infer, from the instances proved in this manor, that there is a rule or canon of descent which comprehends every case which comes within it; and that rule is, that the nearest youngest male heir instead of the nearest oldest male heir of the person last seised is entitled to take as customary heir. Therefore I think that the plaintiff is entitled to judgment.

Judgment for the defendant.

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## WILLIAMS v. THE AFRICAN STEAM SHIP COMPANY.

The Merchant Shipping Act, 1854, section 503, provides, that no owner of any sea-going ship shall be liable to make good any loss that may happen without his actual fault or privity to any gold, &c., put on board such ship, by reason of any robbery, &c., unless the owner has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared the true nature and value of such articles.

*Held*, that a bill of lading describing a parcel of gold shipped as "one box containing about 248 ounces of gold dust" was not a sufficient statement of the value.

THE declaration stated, that the plaintiff caused to be delivered to the defendants in and upon one of their ships, at Cape Coast Castle in Africa, divers, to wit, four bags and one box of gold-dust of the value of 2000*l.*, to be carried and conveyed by the defendants (with liberty to tranship, &c.) to, and delivered within a reasonable time in that behalf at the port of London (the act of God, the Queen's enemies, &c., being excepted &c.) unto the plaintiff or his assigns, he and they paying freight for the said gold-dust, as customary, ten per cent. primeage thereon; should any average arise on the voyage, the same to be paid by the consignees.—Averments: that the defendants accepted the gold for the purpose and on the terms aforesaid: that plaintiff was always willing to accept, &c., and pay freight and charges, &c.; but that though a reasonable time had elapsed, and the defendants were not prevented by the act of God, &c., or by any of the risks excepted, and though the plaintiff performed all conditions precedent, and all things, had happened, and all times had elapsed, &c., which were necessary to happen and elapse, &c., to entitle the plaintiff to have the goods; and though the defendants carried and delivered a part of the said gold-dust, yet the defendants have not carried, conveyed, and delivered the residue of the said gold-dust, to wit, one bag and one box of gold dust, and the same has not been delivered to the plaintiff; but while the defendants had the said gold-dust, the defendants took so little and such bad care of it, that one bag and one box of the same then, by reason of the bad and improper care and conduct of the defendants, and not by means of

any of the excepted risks, became and were wholly lost to the plaintiff.

Plea.—That at the time of the shipment and delivery, &c., and of the receipt and acceptance, &c., the plaintiff was a British subject, and subject to the laws of the United Kingdom of Great Britain and Ireland; and the defendants were and still are a body corporate, established under, and subject to the laws of, and having their principal place of business in the said United Kingdom: and the said ship, in and upon which the said goods were so delivered and caused to be delivered, belonged to the defendants as such body corporate, and was a British ship, and duly registered as such British ship according to the laws of the United Kingdom. And the defendants further say, that the said goods, at the time of the shipping and delivery thereof in and upon the said ship as aforesaid, consisted of a large quantity of gold; and that the said portion or residue thereof alleged not to have been carried, conveyed, or delivered as therein mentioned, and to have been lost as therein mentioned, was feloniously stolen out of the said ship without the actual fault or privity of the defendants, then being the owners of the said ship, and was so lost by reason or means of such felonious stealing: and that neither the owners nor the shippers of the said goods, at the time of shipping the same, or at any other time before the said loss, inserted in their bill of lading, or otherwise declared in writing to the master or owner of the said ship, the true nature and value of the said goods, to wit, of the said gold, according to the form of the statute then and still in force in that behalf.

Replication—(setting out verbatim the bill of lading, in which the goods were described as “one box containing about 248 ounces of gold-dust, being marked and numbered as in the margin” (No. 1, W. W.), and at the foot of

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which the master, &c., affirmed to "bills of lading," &c. "Contents, weight, and value unknown, &c.")—That the box, marked and numbered as in the bill of lading stated, contained in it the four bags and the box of gold-dust in the declaration mentioned, and that the true nature and value of the articles therein was about 248 ounces as stated, and that the defendants received freight on such value inserted therein.

Demurrer and joinder therein.

Tomlinson, in support of the demurrer.—The plea is founded on the 17 & 18 Vict. c. 104, s. 503, by which it is enacted, that no owner of any seagoing ship, or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity, "to any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board any such ship, by reason of any robbery," &c., "unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles;—to any extent whatever." The description in the bill of lading, about 248 ounces, is not a sufficient statement of the value or even of the quantity of the gold-dust. Gold-dust varies greatly in value, and the words "contents, weight, and value unknown," shew that the value was considered by the parties as unascertained.

Blackburn (with whom was *J. Sharpe*), in support of the replication.—It must be admitted that if it be absolutely necessary that a precise price should be stated, the declaration in the bill of lading of the nature and value of the goods is insufficient. But if so strict a construction be put on the words of the Act, an error in judgment would be fatal to

the rights of the shipper. The present Act has repeated, with some slight variations, the provisions of the 26 Geo. 3, c. 86, s. 3, the preamble of which recites that, "Whereas disputes may arise whether the owners or masters of ships are liable to make good the value or amount of any gold &c. which may be lost, after the same have been put on board their ships on freight, without the shippers at the time declaring the value of such goods." There was, at the time of the passing of that Act, a doubt whether or not, where there was a concealment of the true value by the sender of goods, a carrier could be made liable (*a*). [Martin, B.—The question does not depend on the previous Act.] The object of the present Act is, that a carrier by sea should have such information as to suggest to him the necessity of caution, when valuable articles are entrusted to his care. If the statement is sufficient to put him on his guard, it is enough.

ALDERSON, B.—I am of opinion that the replication is bad, and that the defendants are entitled to judgment. In order to make the owner of any sea-going ship responsible for the loss of or damage to any gold, silver, diamonds, watches, jewels or precious stones, put on board any such ship, the shipper of the goods is required to state the true nature and value of the goods consigned by him. If diamonds were to be put on board in Brazil, it would not be sufficient to describe them as so many diamonds. Diamonds are just as much currency as gold dust is. The proper mode of stating their true nature and value would be to describe them as so many diamonds, and to state their value in money; and so of watches, jewels, or other precious stones. The nature of the gold is here sufficiently stated; it is enough to describe it as gold-dust, without stating of

(*a*) See cases referred to by Mansfield, C. J., 4 Bur. 2301.

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how many carats fineness. But there is not an exact statement of the quantity; it is said to be *about* 248 ounces; and so far from the value being stated, there is not even an estimate of it. The shipowner is declared not to be liable except in the particular case mentioned in the Act.

MARTIN, B.—I am of the same opinion. If the Act could be read as Mr. *Blackburn* has suggested, it could only be by putting a forced and unnatural meaning upon the words of it. I presume that when the legislature required the true nature and value of such articles to be stated, they meant what they said, viz., *the true nature and value*. If all gold dust was of the same value, so that when the quantity was stated the value would be known with tolerable certainty, possibly we might hold that a mere statement of the quantity would be sufficient, though that would be a strained construction. I doubt whether the word "true" applies to value. I think that the owner may state as the value what he really and honestly believes to be the value, and that if a question arose respecting the validity of the declaration of value, it would be, not whether the value stated was the true value, but whether the declaration had been made *bonâ fide*. The value required may be a conventional value, rendering the shipowner liable to an extent not exceeding the value declared. The preamble of the 3rd section of the 26 Geo. 3, c. 86, appears to me to be against Mr. *Blackburn*. It shews that the legislature contemplated securing to the carrier full notice of the value; that the value was considered the material thing of which the shipowner was to have notice, that he might know to what extent he would be responsible in case of loss. So by the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68, carriers are entitled to know the value of the enumerated articles, being of great value in small compass, in order that they

may take precautions to protect themselves proportioned to the risk. Gold dust may vary in value as much as any other merchandize. We are bound to give a plain and intelligible meaning to the words of the Act, and according to that the plaintiff is not in a condition to recover.

ALDERSON, B., added.—The only case where the description would be sufficient without an express statement of the value, seems to me to be where the shipment consists of coin; there it may be enough to state the number and description of the coins.

Judgment for the defendants.

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BILL v. THE DARENTH VALLEY RAILWAY COMPANY.

June 16.

DEBT for work and services done and rendered by the plaintiff to the Darenth Valley Railway Company.

Plea:—That by the “Darenth Valley Railway Act, 1853,” the defendants were incorporated by the name of the Darenth Valley Railway Company, and that the “Companies Clauses Consolidation Act, 1845,” was thereby incorporated with and made part of that Act; that the claim of the plaintiff was for work and services done and rendered by him as secretary to the Company, and that no determination as to the remuneration of the plaintiff, or of any secretary of the Company, had ever been exercised at any general meeting of the Company as required by the 91st section of the “Companies Clauses Consolidation Act, 1845;” and that the “Darenth Valley Railway Act, 1853,” contained no provision whatever as to the appointment or remuneration of any secretary to the Company.

Replication:—That before the suit divers general meetings of the Company, at which the said determination as

Under the 91st section of the “Companies Clauses Consolidation Act, 1845,” the determination as to the remuneration of the secretary of a Company is to be exercised only at a general meeting. But it is no answer to an action by a secretary for his salary, that no determination as to such salary had ever been exercised at any general meeting of the Company.

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to the remuneration to be paid to the plaintiff for the said work and services as such secretary could and might and ought to have been exercised, could and might and ought to have been held, and had, in fact, been held; and that the plaintiff's claim, for and in respect of such work and services, always was a fair and reasonable claim, and not otherwise, as the defendants well knew.

Demurrer and joinder therein.

Barnard, in support of the demurrer.—By the 8 & 9 Vict. c. 16, s. 91, it is provided, that except as otherwise provided by the special Act, the determination as to the remuneration of the secretary is to be exercised only at a general meeting of the Company. Therefore, unless the special Act provides otherwise, no action can be maintained by the secretary of a railway company unless the amount of his remuneration has been determined by a general meeting of the company. In *Taylor v. Brewer*(a), a person having performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right," it was held that he could not recover a recompence for such work.

Brett, contra, was not called upon.

BRAMWELL, B.—These acts of parliament are construed as if they were partnership deeds. To violate them may be a breach of trust as between the directors and the shareholders; but acts not done according to them may bind the company. If the directors, without such authority, have agreed to give the plaintiff 500*L*. a year they may have been guilty of a breach of trust, but that is all.

ALDERSON, B., and *MARTIN*, B., concurred.

Judgment for the plaintiff.

(a) 1 M. & Sel. 290.

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WOOLLEY v. KAY.

June 16.

THE declaration stated, that after the passing of the Act 7 & 8 Geo. 4, c. lxxvii. (a), the defendant became and was a commissioner for carrying that Act into execution, chosen and elected, &c. And that the defendant after he was so chosen and elected to be such commissioner, and whilst he was such commissioner, and before the commencement of this suit, to wit, on, &c., then being directly concerned and interested in a certain then existing contract theretofore made, by and on behalf of the defendant and one Charles Kay Lawton, with the then commissioners in

(a) For lighting, cleansing, &c. Waterworks Company, incorporated by an Act (6 Geo. 4, c. 67), shall not be disqualified from acting as commissioners in the execution of this Act, by reason of any contract being entered into between the commissioners for executing this Act and the said Ashton-under-Lyne Gas and Waterworks Company; but that such of the said commissioners as are members of the said Company, shall not vote in any question in which the said Company may be interested," &c. Section 4 imposes a penalty of 100*l.* on persons disqualified acting as commissioners. By sections 54 to 61, the streets are placed under the control of the commissioners. By 9 Geo. 4, c. xlii., s. 21, the commissioners were empowered to widen and alter streets; and by section 22, to purchase land for the purposes of that Act.

By 7 & 8 Geo. 4, c. lxxvii., s. 2, no person shall be capable of acting as a commissioner in the execution of that Act, who shall be interested in any contract for furnishing, supplying or selling any article, matter or thing to be employed or made use of for the purposes of the Act.

Held, that a person who had contracted with former commissioners to sell a plot of land to be used for the purposes of the Act was not disqualified from acting though the conveyance had not been executed.

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that behalf duly appointed to act and acting in the execution of the said Act, for the sale by the defendant and one Charles Kay Lawton to the said commissioners for carrying the said Act into execution, of a certain plot of land to be used, and which was used by the said commissioners for one of the purposes of the said Act, &c., but not regarding the said Act, nor fearing the penalty, &c., acted as such commissioner in the execution of the said Act at a meeting of the commissioners in that behalf duly appointed, acting in the execution of the said Act, held on, &c., at &c., and acted and took part in the business of the said commissioners, transacted by them as such commissioners at such meeting, contrary to the said statute ; he, the defendant, being then disqualified to act as such commissioner by and for the cause aforesaid, and not being a member of the Ashton-under-Lyne Gas and Water Works Company in the said Act in that behalf mentioned, or of any other company or corporation having power to supply the said Town of Ashton-under-Lyne aforesaid with gas or water, and not being a Justice of the Peace acting as a Justice of the Peace in the execution of the said Act, whereby the defendant forfeited 100*l.*

Demurrer and joinder therein.

J. Addison (with whom *Hugh Hill*), for the plaintiff.—The question is, whether a contract for the sale of land, to be used for the purposes of the Act, is within the second section. Contracts with the commissioners relating to land are within the scope of this clause ; and in fact peculiarly within the mischief which it was intended to counteract. In *Simpson v. Ready*(a), a lease was held to be a contract within the 5 & 6 Wm. 4, c. 76, s. 27. Here the words are quite general. [Alderson, B.—Is land an article, matter or thing furnished, supplied, or sold ? It may be argued

(a) 12 M. & W. 736.

that it is so, but a penalty must be imposed by clear words.] The object was to prevent any bargaining which might give the commissioners an interest adverse to their duty. After the contract had been made and before the conveyance, and while questions might still arise, the defendant acted as commissioner. The proviso in the 11th section of the 7 & 8 Geo. 3, c. lxxvii., shews how anxiously the Legislature has provided against such influences.

T. Jones, contrà, was not called upon.

ALDERSON, B.—The 4th section imposes a penalty on commissioners who act as such when disqualified. Whether the defendant was disqualified depends upon the 2nd section, which provides, "that no person shall be capable of acting as a commissioner during the time he shall hold any office or place of profit under the commissioners, or in any case wherein he shall be personally or beneficially interested (except as a creditor), or who shall be concerned or interested in any contract or bargain for furnishing, supplying, or selling any article, matter, or thing, to be employed or made use of for the several purposes of that Act." Here the defendant had entered into the contract before he acted as a commissioner, and all that remained for him to do was to sign a piece of paper and receive his money. The prohibition appears to me to apply only to continuing contracts, such as contracts for furnishing goods; and, accordingly, I find a special protection to shareholders in the Gas Works. A single bargain—as if the commissioners bought a brush in a shop, would not disqualify the seller, though the price had not been paid. I think, therefore, that the defendant is not liable to the penalty, and that he is entitled to judgment.

MARTIN, B.—I am of the same opinion. The defendant and Lawton had bargained with the former commissioners,

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and it is said that he is therefore disqualified. But the declaration does not charge him with being interested in any bargain with the present commissioners, but merely that being interested in a certain then existing contract for a sale of a plot of land he acted as a commissioner, and the question is, whether for so doing he is liable to the penalty. I think that he is not. It would be an abuse of language to hold that under the words, "contract for furnishing, supplying, or selling any article matter, or thing to be employed or made use of for the purposes of the Act," a contract for the sale of land would be included. Mr. Addison relied on the exception in favour of shareholders in the Gas Works, but I think that it furnishes an argument against him, and that the defendant would have incurred the penalty, if, as commissioner, he had acted in any matters arising out of the contract in which he and Lawton were interested.

BRAMWELL, B.—I agree with the rest of the Court. The 11th section provides "that any clerk, treasurer, or other officer or person employed by the commissioners who shall be concerned or interested in any bargain or contract made by the commissioners, shall be incapable afterwards of serving or being employed under the commissioners." Suppose that one of the servants of the commissioners, who kept a shop, sold a single article to the commissioners, the price of which was unpaid, could it be contended that, by being concerned in a single isolated transaction of that sort, he would vacate his office? This agreement to sell a piece of land is nothing more. It is not a contract for a thing to be furnished. The clause was meant to prevent persons acting as commissioners who might be interested in continuing contracts for the supply of goods.

Judgment for the defendant.

1856.

VERNEDE and Others v. WEBER.

June 28.

THE declaration stated, that the plaintiffs and the defendant contracted together, and made and entered into a certain contract between them which was contained in and made and set down in writing in certain bought and sold notes, which corresponded with each other, and which were respectively signed by the agent of the plaintiffs and of the defendant thereunto lawfully authorized, and the bought note thereof, which was delivered to and retained by the plaintiffs, was in the words and figures following, that is to say—

“ London, 27th February, 1855.

“ Bought for account of Messrs. Vernede and Company (meaning the plaintiffs), of Mr. C. F. Weber (meaning the defendant), the cargo of 400 tons (provided the same be shipped for seller's account), more or less, Aracan Necrensie rice, of the average quality of the crop as shipped to Europe, per British vessel Minna, sailed last September from Antwerp in ballast, direct to Akyab, to proceed from thence to a port in the channel for orders, at 11s. 6d. per cwt. for Necrensie, or at 11s. for Larong, the latter quantity not to exceed fifty tons, or else at the option of buyers to reject any excess: to be taken at the invoice weight, viz., eighty-six baskets being equal to one ton of twenty cwt., with an allowance of four per cent. for loss in weight, and to be paid for, by cash, on arrival of the vessel at the port of call, on delivery of the bills of lading, charter party, and policy of insurance;

Necrensie rice, but that the contract was conditional upon a cargo of Aracan Necrensie rice being shipped on seller's account.

Secondly, that the buyers were not entitled to the delivery either of the whole cargo or of the Larong rice, because the contract was for an entire cargo which would substantially satisfy the description of Aracan Necrensie rice.

The plaintiff and defendant, by their agent, contracted as follows:—
 “ Sold for W. to H. 400 tons, provided the same be shipped for seller's account more or less Aracan Necrensie rice at 11s. 6d. per cwt. for Necrensie, or at 11s. per cwt. for Larong, the latter quantity not to exceed 50 tons, or else at the option of buyers to reject any excess, to be paid for by cash on arrival of the vessel at the port of call on delivery of the bill of lading, charter-party and policy of insurance, insurance effected to the full amount of the invoice.”
 The vessel loaded 285 tons of Larong and 150 tons of Latourie rice.

Held, first, that the contract did not contain a warranty that the rice should consist of Aracan

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insurance effected in London or Holland, upon usual London terms (with particular average), to the full amount of invoice. The vessel to proceed to a port in the United Kingdom, or to a continental port between Havre and Hamburg, both inclusive; should the vessel be lost before arrival at port of call, this contract to be void. (Signed) L. B. Schröder."

Averments: that from the time of making the contract the plaintiffs were always ready to perform, and except so far as they were prevented by the breach of the contract by the defendant as thereafter mentioned, they always performed and fulfilled the contract, of which defendant had notice; that a reasonable time for the defendant to perform the said contract had elapsed before suit.—First breach: that although a cargo of 400 tons, more or less, was shipped, for the defendant's account, to Europe, by the said British vessel Minna, at the time and place and on the voyage and occasion by the said contract intended, and the said vessel afterwards arrived therewith at the port of call and at her port of discharge in the said contract mentioned: yet the said cargo was not Aracan Necrensie rice of the average quality of the crop, nor was the said cargo such Aracan Necrensie rice as last aforesaid, and Larong, but consisted of 3,403 bags of Larong, which weighed, on delivery, 285 tons net, and of 1,986 bags of Latourie, which weighed, on delivery, 159 tons and three-quarters of a ton net, and of no other rice whatsoever.—Second breach: that although the last mentioned cargo was shipped, and the said vessel arrived therewith, and all things had happened before this suit necessary to enable the defendant to deliver the cargo, and the bills of lading, charter party, and policy of insurance relating thereto, respectively, to the plaintiffs: yet the defendant did not nor would deliver to the plaintiffs the said bills of lading, charter party, and policy of in-

surance, or any of them, or the said cargo, or any part thereof, but under colour and pretence that the said cargo did not consist in all or in part of Aracan Necrensie rice, refused and neglected, and still refuses and neglects so to do; and by means of the premises the plaintiffs have been deprived of great gains and profits which they otherwise might and would have made, and have been and are prevented from performing a contract beneficial to them, and into which they had entered for the sale of the said cargo, and from obtaining the profit and benefit thereof, and have been and are otherwise greatly injured, &c.

First plea.—As to the first breach; that the sold note of the contract, which was delivered to the defendant, was and is in the words and figures following, that is to say—London, 27th February, 1855. Sold for and on account of, &c. (setting out a sold note which corresponded with the bought note in the declaration). And that there was no contract between the plaintiffs and the defendant save as appears by the said bought and sold notes.

Second plea:—That the sold note was in the words and figures as in the first plea mentioned, and that there was no contract between the plaintiffs and the defendant save as appears by the said bought and sold notes; that the cargo did not consist wholly or in part of Aracan Necrensie rice, nor wholly, but only in part, of Larong rice, but that the said cargo did consist of such rice of such respective quantities as in the declaration in that behalf mentioned; and that the Larong rice therein mentioned was not, nor was any part thereof, Aracan Necrensie rice; and that the Latourie rice therein mentioned was not, nor was any part thereof, either Aracan Necrensie rice or Larong rice.

There were also demurrs to the declaration so far as related to the first and second breaches of contract.

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The plaintiffs joined in the demurrs to the declaration, and demurred to the pleas.—Joinder in demurrer.

Wilde (with whom was *W. G. Harrison*), in support of the demurrer to the pleas (*a*).—As to the first breach, the plaintiffs contend that the effect of the contract contained in the bought and sold notes is, that if the Minna shipped at Akyab a cargo on seller's account, such cargo on being shipped became the property of the plaintiffs, with a warranty that it should consist of Aracan Necrensie rice. This case will be compared to cases of sales of cargoes "to arrive," which were at one time supposed to be sales with a warranty that the cargo should arrive, though it has since been decided that they are sales subject to a double condition, viz., the arrival of the vessel, and that the stipulated cargo should be on board (*b*). Here the words are, not "to arrive," but "provided the same be shipped for seller's account." These words contain the condition,—the only thing necessary to make the sale absolute, viz., that a cargo of rice should be put on board on the seller's account. From that moment the sale was complete, and the rice was at the risk of the purchaser. The seller, therefore, cannot refuse to deliver the rice because it does not in all respects answer the description in the contract. The whole scope of the contract must be considered, and from that it is clear, that it was not intended that the plaintiff should lose the benefit of the contract because a small part of the cargo might turn out to consist of some other rice. [*Martin*, B.—How is a price to be fixed for that which is not Aracan Necrensie or Larong rice?] The price may be fixed by analogy: in cases of freight, where a certain freight

(*a*) June 16. Before *Alderson*, B., and *Martin*, B.

(*b*) *Johnson v. Macdonald*, 9 M. & W. 600.

is agreed upon for some articles, if others are shipped, and there is a mode of comparison, that rate is adopted; if not, the freight is chargeable at the current rate at the port where the goods were shipped. [*Martin*, B.—Would the plaintiff have been bound to take rice which did not answer the description of that bought by him?] The substance of the contract was a sale of the cargo; and that the vendee should pay for it. The parties contemplated, that it would be of a certain description, and that the payment should be made in a particular way. The case of *Reade v. Meniaeff* (*a*) shews, that in these mercantile contracts, though the mode of payment, in case of the performance of the contract in any other way than that contemplated, is not provided for, the purchaser may still be liable to pay in some way. [*Martin*, B.—Surely the Statute of Frauds renders it impossible to hold the seller bound, except by the terms of the written contract.] In the present case, what was sold was the rice that was shipped on board that vessel. [*Alderson*, B.—Suppose that all the rice was Latourie, must the defendant have taken the whole? or what part? and at what price?] It is plain that the cargo was not intended to be limited to Aracan Necrensie rice. In *Lovatt v. Hamilton* (*b*), there was a contract for the sale of fifty tons of palm oil, to arrive *per the Mansfield*: it was held, that this was an entire contract; and part only having arrived, that the plaintiff was not entitled to the delivery of that part. But the contract in that case was the sale of a cargo “to arrive.” Here the sole condition upon which the contract was to become absolute, was fulfilled when the cargo was put on board. [*Martin*, B.—Suppose the Latourie had arrived greatly damaged, would the defendant have been bound to accept it?] In

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Fischel v. Scott the Court thought, that if goods are sold, "expected to arrive" by a particular ship, the vendor cannot excuse his non-delivery by shewing that only a part of the goods was consigned to him (a). As in that case it was considered, that the parties must be taken to have contemplated that the goods would be shipped on seller's account; so here it must be taken that the parties contemplated, and that the defendant warranted, that this rice would be Aracan Necrensie rice.

Tomlinson, for the defendant.—The contract is for 400 tons of rice, commercially called Aracan Necrensie rice. A moderate proportion of Larong rice, for which a reduction is to be allowed, is not to destroy the contract; but the Larong is not to exceed fifty tons, or, if it does, the buyers are to have the option of rejecting any excess. By the stipulation as to payment, it is evident that the contract is for an entire thing, a cargo of Aracan Necrensie rice. The obligation of the plaintiff to receive the cargo, and of the defendant to deliver it, are reciprocal and co-extensive, with a small exception. There is no warranty as to Larong, which shews that the Larong rice was merely a subordinate matter.

Wilde, in reply.—The contract as to the Larong was not merely accessory. If a moiety, or more than a moiety, of the cargo had been Larong, the purchaser would have had a right to take it all, though he was not bound to do so.

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 15 C. B. 69. It was stated by *Tomlinson*, that, since the decision of this case, the words "provided the same be shipped

on seller's account," have been commonly inserted in such contracts.

ALDERSON, B.—These are demurrs by the defendant to the two breaches in the declaration, and demurrs by the plaintiffs to two pleas to the same breaches. The questions raised by the demurrs are—first, whether in a sold note, set out in the first plea, there is an absolute warranty that the defendant should ship a cargo of Aracan Necrensie rice on board a vessel called the Minna. If there be such warranty, the plaintiffs are entitled to judgment as to the first breach: secondly, whether the plaintiffs were entitled to have delivered to them the entire, or any portion of the rice, which was brought by the Minna to her port of discharge in Europe. If they were, the plaintiffs are entitled to judgment as to the second breach. The sold note is as follows:—London, 27th Feb. 1855. Sold for account of C. F. Weber, Esq. (the defendant), to Messrs. Vernerde & Co. (the plaintiffs), the cargo of 400 tons (provided the same be shipped for seller's account), more or less, Aracan Necrensie rice, of the average of the crops as shipped to Europe, per British vessel "Minna," sailed last September from Antwerp in ballast direct to Akyab, to proceed from thence to a port in the channel for orders, at 11s. 6d. per cwt. for Necrensie, or at 11s. per cwt. for Larong, the latter quantity not to exceed fifty tons, or else at the option of buyers to reject any excess. To be taken at the invoice weight, viz. eighty-six baskets being equal to one ton of twenty cwt., but an allowance of four per cent. for loss in weight, and to be paid for by cash on arrival of the vessel at the port of call on delivery of the bill of lading, charter-party, and policy of insurance. Insurance effected in London or Holland upon usual London terms (with particular average), to the full amount of invoice. The vessel to proceed to a port in the United Kingdom, or to a continental port between Havre and Hamburg,

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both inclusive. Should the vessel be lost before arrival at port of call, the contract to be void.—(Signed) L. B. Schröder.

The case has been argued before my brother *Martin* and myself, and we think there is no such warranty in the contract as will support the first breach. The cargo contemplated by both parties (for no fraud is imputed) was one mainly of Aracan Necrensie rice; but this was not an absolute contract; it was subject to a proviso that such a cargo should be shipped, and we are of opinion that there is no absolute warranty that the rice which was shipped on board the vessel should be of this description. We therefore think the defendant is entitled to our judgment on the demurrer to the first breach and as to the first plea.

As to the second breach, the facts averred are these; that the vessel proceeded to Akyab, and there loaded 285 tons of Larong and 150 tons of Latourie rice, and arrived therewith at her port of call and port of discharge in Europe, and that although all things had happened to enable the defendant to deliver the cargo to the plaintiffs, he did not deliver it or any part of it.

Upon this state of facts two questions were argued. First, were the plaintiffs entitled to the delivery of the entire cargo? Secondly, were they entitled to such part of it as consisted of Larong rice? We are of opinion that the plaintiffs were not entitled to the delivery of the entire cargo. We think the contract was not for such cargo of rice as the vessel should bring to Europe, but for rice the price of which was fixed and agreed on between the parties.

If the plaintiffs were entitled to the Latourie rice, a jury must determine, in the event of difference, the price to be paid, and we do not think that either party contem-

plated a sale of rice which was not at a stipulated price, but which was to be left to the decision and determination of third parties.

As to the Larong rice there is considerable difficulty; there can be no doubt, however, that the contract contemplates a cargo consisting principally of Aracan Necrensie rice, and that Larong rice was to form but a subsidiary part. The contract is described as one contract for an entire cargo, one bill of lading, one charter party, and one policy of insurance, and we think it would have been impossible for the defendant to have insisted upon the plaintiff's accepting a cargo consisting only of a minute portion of Aracan Necrensie rice; for unless the cargo was what would substantially satisfy the description of a cargo of Aracan Necrensie rice, we think that the plaintiffs could not have been bound to accept it.

It is true that the contract included Larong rice also if the cargo included it. But it is obvious that this was so much considered subsidiary to the other, that the cargo is described merely as one of Aracan Necrensie rice, and the buyer was not obliged to accept more than 50 tons of Larong rice included in a cargo so described, and if the plaintiff would not have been bound to accept the cargo brought, the defendant was not obliged to deliver it, for the contract must be mutual and reciprocal.

We, therefore, think that the defendant is also entitled to our judgment on the second breach, and the plea pleaded to it.

Judgment for the defendant.

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STOKES v. COX AND OTHERS.

The plaintiff effected an insurance with the "Birmingham Fire Office," by a policy in which the subject matter of insurance was thus described:—"On a range of buildings of three stories all communicating, comprising offices, warehouses, carriers' shops and drying rooms, having a stock of oil (not exceeding one hundred gallons), and tallow (not

DECLARATION on a policy of insurance sealed with the seals of the defendants, being three of the directors of "The Birmingham Fire Office Company."—The declaration set out the policy which (so far as material) was as follows:—

" WHEREAS, the following sums have been paid by Stephen Stokes & Co. of Walsall, Staffordshire, Curriers and Leather Dressers.

" TO THE BIRMINGHAM FIRE OFFICE COMPANY, viz.:—

Present payment for Premium from the 14th Nov. 1853 to the 25th Dec. 1854	£13 7 6	Present Payment. £20 1 3
Present payment for Duty to ditto	6 13 9	

exceeding four hundred weight) deposited therein; part of lower story of said building being used as a stable, coach-house and boiler-house: no steam-engine employed on the premises: the steam from the said boiler being used for heating water and warming the shops. Brick and tiled or slated. N.B. The process of melting tallow by steam in said boiler-house, and the use of two pipe-stoves in said building, are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein nor in any building adjoining thereto." The descriptions of insurance were fourfold, "Common," "Hazardous," "Doubly Hazardous," and "Special Risks;" and the policy stated, that "when insurances deemed Special Risks are proposed, the most particular specifications of the property, and all circumstances attending the same, will be required; but all which Special Risks must be particularised on the policy, to render the same valid or in force." One of the conditions indorsed on the policy, provided that, If after the assurance shall have been effected, the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, coakel, kiln, furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy, and a proportionate higher premium paid (if required), such insurance shall be of no force. The insurance in question was a "Special Risk." After the policy was effected the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam-engine, which was supplied by steam from the boiler mentioned in the policy, but the risk was in no way increased. The premises were afterwards destroyed by accidental fire.

Held, (per Pollock, C. B., and Martin, B., dissentientes Bramwell, B.), that the introduction of the steam-engine and use of the steam generated in the boiler to work it, was a material alteration in the subject matter insured, and therefore avoided the policy.

"Policy and Stamp.

"The receipt of which respective sums is hereby acknowledged. AND WHEREAS, it hath been agreed that the following sums shall hereafter be paid yearly to the said Company, on the day last aforesaid, during the continuance of this Policy, viz.:—

"The future Annual Payment for Premium	£12 0 0	Future Payment.
"The future Annual Payment for Duty	6 0 0	

"For the insurance from loss or damage by fire, not exceeding in each case the sum or sums hereinafter mentioned, amounting to four thousand pounds on the property herein described, in the place or places hereinafter particularised, and not elsewhere, unless previously allowed by indorsement of this policy, viz.:—

"On a range of building of three stories all communicating, situate fronting to Hatherton Street and Littleton Street, Walsall aforesaid, comprising offices, warehouses, curriers' shops and dressing rooms, having a stock of oil (not exceeding one hundred gallons) and tallow (not exceeding four hundred weight) deposited therein,—part of lower story of said building being used as stable, coach-house and boiler-house—no steam engine employed on the premises—the steam from said boiler being used for heating water and warming the shops.—Brick and tiled or slated.	£800
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<u>1856.</u>	"On Stock in Trade therein	£3,000
<u>STOKES</u>	"On Fixtures and Utensils therein	100
<u>b. cox.</u>	"On Live and Dead Stock and Utensils in said Stable	80
	"On Carriages in said Coach-house	20
		<hr/> <u>£4,000</u>

"N.B. The process of melting tallow by steam in said boiler-house, and also the use of two pipe stoves in said building are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein, nor any building adjoining thereto.

"Now BE IT KNOWN, That from the date of these presents until the day above mentioned, and so long afterwards as the said assured shall duly pay, or cause to be paid, the said premium and duty to the said company at the time aforesaid, and the acting directors of the said company, for the time being, shall agree to accept the same, the capital, stock and funds of the said company shall be subject and liable to pay to the said assured all the damage and loss which the said assured shall suffer by fire on the property herein mentioned, not exceeding in each case respectively the sums hereinbefore specified, on the property herein-before set forth, according to the tenor of the printed rates and conditions of the said company indorsed on this policy." Then followed a proviso, that the stock and funds of the Company should alone be answerable for demands under the policy.

The printed rates and conditions indorsed on the policy, were (so far as material) as follows:—

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“TABLE OF ANNUAL PREMIUMS TO BE PAID FOR INSURANCE.

COMMON INSURANCE, 1*s.* 6*d.* *per Cent.*

“BUILDINGS.

“Brick or stone buildings, having party-walls of brick or stone, and covered with slate, tile, or metal, in which no hazardous process is carried on, or any quantity of oil or other hazardous goods deposited, except for private domestic use, or stove with metal pipe, or any other than common open fires used; or which buildings are not immediately adjoining to any building wherein a hazardous trade is carried on, or hazardous goods deposited.

“Goods.

“Any description of goods or stock of only common hazard, in buildings not hazardous as above described.

HAZARDOUS INSURANCE, 2*s.* 6*d.* *per Cent.*

“BUILDINGS.

“Brick or stone buildings, having party-walls of other materials than brick or stone, and brick and timber, and timber and plaster buildings covered with slate, tile, or metal, and buildings not hazardous as before described in which any stove, coakel, kiln, or the like, is used, or in which any hazardous process is carried on, or dangerous goods deposited.

“Goods.

“Musical instruments, pictures (no one picture to exceed 10*l.* in value, unless a specific sum is insured thereon), drawings, medals and curiosities, clocks, watches, jewels and trinkets; and hemp, flax, pitch, tar, turpentine, resin, tallow, camphine or naptha, oil, spirituous liquors and other articles of similar risk; and horses, harness, carriages, and fodder, in buildings not hazardous,—ships, barges, and

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other vessels in harbour or dock, or on any canal, or any other inland navigation, with the goods on board thereof; and stage waggons with their contents.

DOUBLY HAZARDOUS INSURANCE, 4s. 6d. per Cent.

“ BUILDINGS.

“ Brick or stone buildings, thatched, in which fire-heat is used, or adjoining any building having fire-heat used therein, and in which no hazardous process is carried on, or hazardous goods deposited,—and hazardous buildings as before described, in which any hazardous process is carried on, or hazardous goods deposited.

“ Goods.

“ China, glass, earthenware, looking glass, plates, pottery, sculpture, and other articles, which on account of their fragility are liable to destruction, in buildings not hazardous. Hazardous goods or stock, as before described, in hazardous buildings, and all goods or stock not hazardous, in doubly hazardous buildings, as before described.

* * * *The above rates of premium are subject to variation according to circumstances, and buildings or their contents, not specially mentioned in the above table, will be rated in conformity with the degree of hazard which may attach thereto.*

“ SPECIAL RISKS.

“ Timber, or brick and timber buildings, thatched, having fire-heat used therein, or adjoining to any building in which fire-heat is used, or in which any hazardous process is carried on; or any stock of lucifer, congreve, or other such like matches, or other hazardous goods deposited,—and generally all buildings or stock of greater risks than is comprised in the foregoing description, under which risks are included the following, viz :—

"The buildings and stock of japanners, sugar refiners, distillers, musical instrument makers, calico printers, flax dressers, saltpetre refiners, dealers in gunpowder, chemists' laboratories, oil, turpentine, and varnish makers, corn and other mills and manufactories having mill, steam, or engine work and buildings, and stock of maltsters making high dried or porter malt, buildings where other hazardous trades or processes are carried on, theatres, and places of public exhibition, glass-houses, hot-houses and conservatories with their contents, stained or etched windows if of greater value than 20s., or plate glass windows if of greater value than 20s. per pane.

"When insurances deemed special risks are proposed, the most particular specification of the property, and all circumstances attending the same, with a ground plan of the premises, will be required; but all which special risks must be particularised on the policy, to render the same valid or in force.

"No lucifer, congreve, or other such like matches, gunpowder, naptha, camphine or the like, except for private domestic purposes, will be allowed in any of the buildings under the first mentioned heads of insurance; such articles, as well as the buildings in which they are deposited, being the subject of special agreement, and requiring to be made known to the office, and recognised on the policy, and a proportionate higher premium paid, otherwise such policy will be vitiated and of no effect."

"CONDITIONS OF INSURANCE.

"II. The insured must state his name, place of abode and occupation, and the nature of the interest he has in the insurance, whether as proprietor, trustee, or otherwise, and must accurately describe the construction of the buildings, and the nature of the goods or other property on which the

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insurance is proposed, according to the several distinctions herein stated; but the company will not be liable for any misdescription of the property insured, nor for any insufficiency of description thereof, howsoever occasioned, it being the interest and duty of the insured to examine his policy and advise the office of any informality appearing therein. By the regulations of the Act of Parliament 9 Geo. 4, c. 13, of which the following is an extract, it is provided, 'In all cases a separate sum is required to be apportioned to every separate building or division of building, if separated by party walls; and a separate sum on the several items of property in each division.' Continual attention must be paid to this regulation, as every violation thereof is subjected by the Act to a penalty of 100*l*.; and it is by the said Act provided, that any policy issued not in conformity therewith shall be absolutely void and of none effect.

" III. If any building contain any stove, coakel, kiln, furnace, steam-engine, or the like, or has at any one time any quantity of oil or other hazardous or inflammable goods, or any gunpowder, or fireworks, or any lucifer, congreve, or other such like matches, except such are required for private domestic use, or any process of fire-heat other than the ordinary risk of the common fires and ovens of private houses, the same must be inserted in the policy, and if any misrepresentation be made, or if particular circumstances of risk which attach thereto shall not be specially inserted in the policy, or if there be any concealment or omission whereby the insurance shall have been obtained at a lower premium than is required by the preceding table of premiums, or if the persons insured shall not give notice of any other insurances made on the property insured, whether by any previously existing policy of this office, or by any previous or subsequent insurance in any other office, and cause the same to be indorsed on their policies by the

secretary or some other authorized agent of this company, such insurance shall be of no force."

"VII. Persons removing to other dwelling-houses, shops, or warehouses, or opening new communications, or taking adjoining premises into occupation, may preserve or extend the benefit of their policies to cover the goods and stock therein, if the nature and circumstances of the risk insured be not altered; and in case of death the interest in the policy may be transferred to the representative of the party insured; but in all the above cases the policy is not held to be in force until due notice of the removal, alteration, or death be given at the office, or to some agent of the company, and the same allowed by indorsement upon the policy by authority of the company. If, after the assurance shall have been effected, the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, coakel, kiln, furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy by the secretary, or some other agent of the company, and a proportionate higher premium paid (if required), such insurance shall be of no force."—

The declaration then averred, that the plaintiff was the person assured by the policy under the style and firm of Stephen Stokes & Co., and was at the time of making the policy, and thence continually until and at the time of the happening of the loss, interested in the insured premises to the amount of 4,000*l.*; that the annual premium and duty were duly paid by the plaintiff to the company: that the policy at the time of the loss was in full force: that during the continuance of the policy, the buildings, stock in trade, &c., insured, were destroyed and damaged by fire, and the plaintiff

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thereby then sustained a loss to a large amount, to wit, 490*l* in respect of the said buildings, and of 2,582*l* 1*s*. 4*d*. in respect of the said stock in trade; and the company thereupon became and were liable to pay to the plaintiff the said amounts, or to make good to him his said loss, and fully to indemnify him for the same: that the plaintiff has observed all and singular the stipulations, conditions &c. to be observed or performed on his part, and all matters have occurred and happened &c. to entitle him to have the several amounts paid to him, or to have the loss made good &c.: that the capital, stock and funds of the company are sufficient to pay to the plaintiff the several amounts, or to make good his loss.—Breach: that the plaintiff has not, out of the said stock and funds, been satisfied the said amounts or either of them, but the same are wholly unpaid, nor has he been provided by the company with a like quantity of goods &c., nor have the said buildings been rebuilt or repaired &c.

Pleas.—First: that after the making and entering into the said policy, and before the happening of the fire in the declaration mentioned, the risk was increased by the erection, by the plaintiff, without the consent or knowledge and against the will of the said company, of a steam-engine in and upon one of the said buildings mentioned in and insured by the said policy, (such steam-engine being an erection of the like nature, as respects the said policy and the stipulations therein contained, as a stove, coakel, kiln or furnace), and by the use and employment by the plaintiff, without such knowledge or consent as aforesaid, of the said steam-engine in the said buildings from time to time in course and for the purpose of the said business; and although, after the erection of the said steam-engine and before the said fire, a reasonable and sufficient time elapsed in that behalf, yet no notice was given by the plaintiff

to the said company of the erection, use or employment of the said steam-engine; nor was the fact of the said steam-engine having been erected, used, or employed, at any time indorsed on the said policy; nor was any higher premium paid to the said company in respect thereof, whereby the said policy became and was void and is of no effect.

Second.—That after the making and entering into the said policy, and before the happening of the fire in the declaration mentioned, the nature and circumstances of the risk insured against were altered and the risk increased, by the erection, use and employment on the said premises, without the knowledge or consent of the said company, of a certain mill, steam, or engine work, which was a special risk of a different kind from, and more hazardous than, the special risk insured against by the said policy. And the defendants further say that no notice of the said alterations was given to the said company, nor were the particulars thereot indorsed on the said policy, or any premium paid in respect thereof.

Replications, taking issue on the pleas.

At the trial, before *Cresswell*, J., at the Staffordshire Spring Assizes, it appeared that in November, 1853, the plaintiff, who was a currier and leather dresser at Walsall, effected with the Birmingham Fire Office the policy of insurance set out in the declaration. At that time, the state of the premises and the circumstances relating to them were correctly described in the policy. In June, 1854, the plaintiff erected in the coach-house a bark mill, and in the stable adjoining the machinery of a steam-engine, and he conveyed, by means of pipes, the steam from the boiler mentioned in the policy to the steam-engine, which was used for working the mill. It was proved that there was a greater consumption of fuel, and that more steam was generated than before. No notice of the erection of the

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steam-engine was given to the company. In December, 1855, the premises were accidentally destroyed by fire.

It was submitted on behalf of the defendants, that the alteration made in the premises, without notice to the company, avoided the policy. The jury found, as a fact, that the actual risk was not increased by the erection of the steam-engine. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit.

Whateley, in last Easter Term, obtained a rule nisi accordingly, against which

Keating and *H. J. Hodgson*, shewed cause in Trinity term (May 30).—The plaintiff is entitled to retain the verdict. The true criterion is this—was the risk increased by the introduction of the steam-engine on the premises? The jury have found that it was not. [Pollock, C. B.—If the statement in the policy amounts to a warranty, not only of the then state of the premises, but also that no alteration shall be made, it makes no difference that the risk was not increased. In that respect a fire insurance resembles a marine insurance; if a vessel is insured for a particular voyage, the owner has no right to send it on another voyage, and say that the risk is not increased.] Where the parties intended that there should be a warranty it is so expressed, as in the memorandum, where “it is warranted that no oil be boiled, nor any process of japping leather be carried on.” The allegation in the pleas that the risk was increased, is a material part of them and must be proved. [Pollock, C. B.—Not if other allegations are proved which constitute a defence.] In *Sillem v. Thornton*(a), the premises proposed to be insured were described as a house composed of two stories; another story was

(a) 3 E. & B. 868.

afterwards added; and it was held that the description amounted to 'a warranty that the premises corresponded with the description when the policy was effected, and to a warranty that the assured would not, during the continuance of the risk, voluntarily do anything to make the condition of the premises vary from the description, so as to increase the liability of the assured. That case proceeded entirely on the ground, that the alteration necessarily increased the risk; and it is only an authority to this extent, that here the description amounted to a warranty of the then state of the premises. [*Pollock, C. B.*—This was a "special risk;" and the policy provides, that "where insurances deemed 'special risks' are proposed, the most particular specification of the property, and all circumstances attending the same, will be required; but all which 'special risks' must be particularized in the policy to render the same valid or in force.] That relates to the third "condition," which requires an accurate and true description of the premises at the time the policy is effected. The seventh condition relates to subsequent circumstances; and it provides, that "if, after the assurance shall have been effected, the *risk shall be increased* by any alteration of the materials composing the building, or by the erection of any stove, coakel, kiln, furnace, or the like, &c., the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy, &c., such insurance shall be of no force." The words "risk shall be increased," override all the subsequent statements, which are only certain specified modes by which risk is increased; therefore, by the terms of the contract (which, according to the authorities on this subject, must be read most strongly against the assurers), no alteration will vitiate the policy unless it increases the risk. In *Glen*

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v. *Lewis* (a), there was an absolute prohibition against any alteration being made in a building insured, or any steam, steam-engine, stove, or any other description of fire-heat being introduced, unless notice thereof was given, and the alteration allowed by indorsement on the policy;—therefore it made no difference whether the risk was increased or not. *Pinn v. Reid* (b) is an authority, that the condition which requires a description of the subject-matter of insurance and the nature of the risk, has reference only to the time when the policy is effected; and that in the absence of fraud, the policy is not avoided by the circumstance, that subsequently to the effecting of it, a more hazardous trade has been carried on without notice to the insurers. [*Martin*, B.—That doctrine was disapproved of by the Court of Queen's Bench in *Sillen v. Thornton* (c).] That case depended on the general law of insurance; here the conditions must be looked at, in order to ascertain the terms of the contract. [*Pollock*, C. B.—The only question is, whether the change of circumstances rendered the policy void, the risk not being in the slightest degree increased. To put an extreme case—suppose a person insured, under a special contract, premises in which fireworks were manufactured, and the policy contained a provision that no alteration should be made in the premises or business without notice, but afterwards the premises were used as an ice-house, would that vitiate the policy?] No doubt it might be made part of the contract, that any alteration in the state of circumstances should avoid the policy; but that is not the case here. The stipulations in this policy are divided into two parts; the first relates to the description at the time the policy is effected, and which is provided for by the third condition; the second relates to any subse-

(a) 8 Exch. 607.

(b) 6 Man. & G. 1.

(c) 3 E. & B. 868.

quent alteration, which is provided for by the seventh condition. The scale of charges increases in proportion to the risk ; but the argument on the other side would go to this extent, that if an alteration was made which diminished the risk, the policy would nevertheless be void.—They also referred to *Shaw v. Robberds* (*a*).

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*Whateley* and *Phipson*, in support of the rule.—The question does not depend on whether the risk was, in fact, increased by the introduction of the steam-engine, but whether, by the terms of the contract, the policy is not avoided by any alteration in the state of circumstances without notice. The company undertake to indemnify the plaintiff against loss by fire, upon a certain description of premises mentioned in the contract, viz., that “part of the lower story of the building is used as a stable, coach-house, and boiler-house ; that no steam-engine is employed on the premises, the steam from the boiler being used for heating water and warming the shops.” That state of circumstances being altered by the introduction of a steam-engine, it is immaterial that the risk was not, in fact, increased. The company expressly stipulate that notice shall be given of any alteration, in order that they may exercise their own judgment as to whether there is any difference in the risk. The statement that no steam-engine is employed on the premises is not a mere description of an existing fact, but an implied warranty that no steam-engine shall be thereafter erected without notice. That being part of the contract itself, the seventh condition is a mere collateral matter, and only applies where there is no provision in the body of the policy. Suppose the policy had stated that a steam-engine, then on the premises, should not be removed without notice ; its removal would

(*a*) 6 A. & E. 75.

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vitiating the policy, notwithstanding the risk might be thereby decreased. In *Sillem v. Thornton* there was no stipulation in the body of the policy that a third story should not be added to the building, and therefore it became necessary to ascertain whether the risk was increased by the alteration. Here there is a distinct contract as to what shall or shall not be done on the premises. The company only undertook to insure premises where the steam was used for certain purposes, and the alteration imposed upon them a different contract. They were willing to undertake the particular risk for a certain sum, but not if the state of circumstances was altered. [Martin, B.—The second plea ought to be amended by simply stating, that after the making of the policy and before the fire, a steam-engine was erected on the premises, and that the steam from the boiler was used for the purpose of working that steam-engine.] Then, independently of the statement in the body of the policy, the seventh condition provides that no steam-engine shall be on the premises. The term "risk" does not mean "actual risk," but a state of circumstances which, with reference to the contract, creates a danger. The question is, whether the risk was increased within the meaning of the policy, not in the opinion of the jury. [Pollock, C. B.—When an underwriter is asked, "will you effect an insurance on this risk?" the word "risk" does not mean the "danger," but the circumstances which give rise to it.]

*Cur. adv. vult.*

The learned Judges having differed in opinion, now delivered their judgments seriatim.

BRAMWELL, B.—I am of opinion that this rule should be discharged. The material facts are, that after the insurance,

an engine, a steam-engine, had been put on the premises, which was supplied by steam from the boiler which is mentioned in the policy; but that no greater risk of fire existed thereby. Now the premises insured having been burned, and there being no fraud, the insurers could only excuse themselves from liability by some term or condition in the policy. They set up two defences: first, that there was a warranty that no steam-engine should be used, or the policy should be void; secondly,—a not very intelligible defence,—that the risk was altered. The first defence was founded on the words in the body of the policy, "no steam-engine employed on the premises," which, it was said, means "was not and should not be." Now it seems to me in this, as in all other cases, that where parties to an agreement might in distinct terms have annexed conditions to their agreement had they thought fit, but have not done so, such conditions ought not to be implied or introduced by construction without almost a necessity for so doing. I am of opinion that the defendant's construction of the words in question is unwarranted. What would have been the meaning had they stood alone, it is not necessary to decide. They are found in a description of the premises as they then were, which is required by the conditions, and found in connection with some things clearly not warranted, and others expressly warranted. And they may very well mean, and, I believe in fact do mean, nothing more than—"this is the now description" on which the insurers act (which if false would violate the policy), but for the continuance of which or any part, they provide, if at all, by other stipulations. However, the words cannot be read alone, for the rates and conditions indorsed are referred to in the policy, and become part of it. Now, by the seventh condition it is provided that "if the risk is increased by any alteration of the materials composing the building, or

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by the erection of any stove, coakel, kiln, furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy by the secretary or some other authorized agent of the company, and a proportionate higher premium paid (if required), such insurance shall be of no force." This shews that the insured is not prohibited from making an alteration or adding a furnace, and the like, unless the risk is increased. It is true the added engine is not the "like," because it has no fire, and is attended with no danger; but it is an alteration of circumstances, if anything. But it is said by the defendants that the body of the policy means, a steam-engine shall not be added, whether risk is increased or not, which is consistent with the seventh condition, and each would have a separate meaning and effect. No doubt such a construction is possible, but it is not natural; and I prefer holding that the statement in the body of the policy, read in connection with the condition, is no warranty that a steam-engine shall not be used; and, with those conditions, amounts only to a description of the then state of the premises, with a warranty and condition to make none of the alterations expressly prohibited, and none which should increase the risk.

The second defence is, that the risk is altered, because the special risks include "mill, steam, and engine work." But the truth is, that these rates and risks merely shew on what terms the office usually makes its policies. This is shewn by the expression, "the above rates of premium are subject to variation according to circumstances." It is certain they might charge extra for a common, or a hazardous, or doubly hazardous insurance, and charge as high as for a special risk; and for a special risk they may charge as low

as for a common. There is no alteration in the nature of the thing insured, though it may be that the added matter would have required particular statement in proposing for the insurance.

Sillem v. Thornton was relied on by each party, but in my judgment that case does not govern this. It was decided on two independent grounds; the first was, that the Court held the description of the premises to be a warranty that they were as described at the inception of, and should so continue during, the risk. That was decided on the particular terms of the document and facts of that case; and as they are not identical with those of the present case, we must construe this on its own terms, which, for the reason I have mentioned, I think do not amount to a warranty. The other ground on which that case was decided was, that by the alteration there the risk was increased; here the jury have found the risk was not increased, and so that also does not apply to the present case.

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MARTIN, B.—This is an action upon a policy of insurance against fire, effected with the Birmingham Fire Office. The insurances to be effected by the company were described on the back of the policy as fourfold,—common, hazardous, doubly hazardous, and special risks. The insurance in question was a special risk, the premium being considerably above that for doubly hazardous insurances. By the terms indorsed on the policy, the most particular specification of the property insured as a special risk, and all circumstances attending it, were required to be stated, and they were to be particularized in the policy. The subject-matter of the insurance as described in the body of the policy, so far as is material, is as follows: “On a range of buildings of three stories, all communicating, situate fronting to Hatherton Street and Littleton Street, Walsall,

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comprising offices, warehouses, curriers' shops, and drying rooms, having a stock of oil (not exceeding one hundred gallons), and tallow (not exceeding four hundred weight), deposited therein; part of the lower story of said building being used as a stable, coach-house, and boiling-house. *No steam-engine employed on the premises, the steam from said boiler being used for heating water and warming the shops. Brick and tiled, or slated.*" A memorandum at the end of the description of the property insured was this: "N. B. *The process of melting tallow by steam in said boiler-house, and the use of two pipe stoves, are hereby allowed;* but it is warranted that no oil be boiled, nor any process of japping leather be carried on therein, or in any building adjoining thereto."

At the trial, before my brother *Cresswell*, at the last Stafford Assizes, it was proved, that after the making of the policy the assured had erected a steam-engine on the premises, and worked it by steam generated in the existing boiler. More steam was used than before; but the jury found that the risk was in no way increased. After the steam-engine was erected, and whilst it was being so worked, the fire happened. The learned Judge directed the verdict to be entered for the plaintiff, but gave leave to the defendant to move to enter a nonsuit. A rule for the purpose was granted, and it has been argued before us; and I am of opinion it ought to be made absolute.

In the case of *Sillem v. Thornton* (a), the Court of Queen's Bench decided, that the description of the subject-matter insured in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from the description, so as to increase the liability of the assurers. In the judgment I entirely concur; it seems

(a) 3 E. & B. 868.

to me to be founded upon correct legal principles applicable to all insurances. The assurer takes upon himself a risk in respect of the specific subject-matter mentioned in the policy; and whether it be an alteration in the subject-matter insured, a deviation from the voyage, or any other thing which by the voluntary act of the assured renders the risk different from that contemplated by the parties and described in the policy, the assurer is discharged.

In the present case there has been no increase of risk, and the case above mentioned is, therefore, no direct authority; but according to its principle or ratio decidendi, as it has been termed, it is to be seen whether, according to the true meaning and intention of the parties as expressed in the policy, the introduction of a steam-engine and the use of the steam generated in the existing boiler to work it, was a matter which the assurers deemed material, and which was provided for by them in their contract. I think it was. It is expressly stated that no steam-engine was employed upon the premises. It is further stated that the steam generated in the boiler was used for heating water, and warming the shops, and in the manufactory; it is stated that its further use was allowed for melting tallow in the boiling-house. There is, therefore, first, a statement that there was no steam-engine; secondly, a statement of the purposes for which steam was then used, and thirdly, of the further purposes for which it might be used, viz., the melting of tallow. It seems to me impossible to contend that all this particularity shall have no effect; and giving a fair and reasonable construction to the requirement as to special risk, and the above circumstances, I think that the introduction of the steam-engine and the use of the steam to work it, was an alteration in the subject-matter insured, which the written contract of the parties shews was a

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material one, and which, when it occurred, suspended the liability of the assurers during its continuance.

It was observed that in the memorandum there was a warranty against certain things, viz., boiling oil and japanning leather, and it was, therefore, argued that there was no warranty against the erection of a steam-engine, or the further use of steam; but to my mind this argument does not much avail: what the law looks at is the substance, and not a name; and the ground of my judgment is, that it is shewn by the terms of the policy, that the assured does not mean to insure the buildings in question against fire if a steam-engine was erected therein, and the steam used for the purpose of working it. In this view of the case it is immaterial whether the risk was increased or not. If a man insures a ship for a voyage by one route, he is not liable if the ship sails by another, notwithstanding it be proved that the latter is the safer of the two. The answer is, that he did not contract against the risk incurred; and that, in my judgment, is the real answer of the defendants in the present case, viz., that they shew by the contract that they did not insure, or mean to insure, these buildings when a steam-engine was erected and steam used to work it. It was strongly and most properly urged upon us, on behalf of the plaintiff, that the seventh condition shews, that no alteration made after the assurance was effected would affect the policy except the risk was thereby increased. But I think that when the assurers shew, by the terms of the contract, that they deem a certain alteration in the subject-matter insured material and important, they must be permitted to judge for themselves, and not have the question whether the risk was thereby increased submitted to a jury. To do so would, in the first place, add a new term to their contract; and, in the second, substitute the judgment of a

jury, upon a matter in which prejudice would be very likely to operate, for the judgment of the assurers themselves. There is a further question whether this defence is admissible under the pleadings. I think sufficient of the last plea is proved; but I certainly think it would be very much better if the plea was amended and the few facts simply stated. This would raise the question on the record.

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POLLOCK, C. B.—In my judgment this rule ought to be absolute. The question turns entirely upon the meaning of the language which constitutes the contract between the insured and the office insuring. If the seventh condition is to be applied to this case, and we are to look to that (and to that only), I should agree with my brother *Bramwell* that the plaintiff is entitled to recover. But I think the seventh condition is not the only matter to be considered, and giving to the contract what appears to me to be its true construction, I think the defendants are entitled to our judgment.

In looking at such a contract, I think no presumption or intendment is to be made in favour of either party, and the construction is not to be more favourable to the one than the other; we are to ascertain what was really meant by the contracting parties, and to decide accordingly. I think it will facilitate the inquiry as to what is the true construction, to consider how the contract would have stood, had there been no such condition at all as the seventh; and then what effect the seventh condition has upon *this* contract, which is based upon the printed rates and conditions indorsed on the policy. The present is a special risk according to the rates and conditions at the back of the policy,—steam is to be used on the premises,—that alone makes it a special risk, and the circumstances attending every special risk are to be particularly stated in the

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policy, otherwise the policy is to be void. Had there been no such condition as the seventh, I am clearly of opinion that the introduction of a steam-engine on the premises ought to have been in the policy, and that for want of that statement the policy became void. The policy on the face of it states that "The process of melting tallow by *steam* in said boiling-house, and the use of two pipe stoves in said building are hereby allowed:" it follows that no other use of steam was allowed; it did not require a warranty that no further use of steam would be adopted,—the extent of the use of steam was limited by the allowance. The office had insured *one special risk*, the party insured substituted another, and introduced a use of steam not allowed by the office. I think the contract of insurance related only to the special risk insured, and not to any other that might be substituted for it; and therefore, assuming the policy to be without the seventh condition, the policy is void and the insured cannot recover.

Now, what is the effect of the seventh condition? It appears to me that it does not permit any change of any sort, provided the risk be not thereby increased, and certainly it does not say so. I think it does not abrogate any condition already imposed; it appears to me to be *cumulative*, and substantially to mean that, in addition to all other protections to guard against fraud upon the office, there shall be the general provision that any change of any description which shall have the effect of increasing the risk, shall vitiate the policy, unless the nature of the change be communicated to and sanctioned by the office. I think this does not abrogate the special terms which belong to a special risk, and therefore I think the rule ought to be made absolute.

Rule absolute.

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Al., being three several sums of 10*l.*, claimed as due to the plaintiffs under the indenture of the 1st day of July, 1845, hereinafter mentioned. By consent and by order of a Judge the following case was stated for the opinion of this Court.—

At the time of the making of the said indenture, the plaintiffs were the occupiers of certain tin works, situated on the river Tawe near Swansea, called the Ynispenllwch Works or Mills. These mills were at the time of the passing of the act of parliament hereinafter mentioned, in the occupation of the executors of John Miers, Esq., and by indenture dated the 1st day of February, 1832, one John Nathaniel Miers, then being the owner, granted a lease of the said mills with their appurtenances, to the plaintiff, William Llewellyn, for the term of sixty years. By virtue of which lease the plaintiffs still occupy the said mills.

The mills are worked by water-wheels, the water being obtained from the river by a short artificial cut, a weir being

opened for the passage of boats through the lock. The defendants to supply the deficiency let water down from above the seventh lock to maintain the water at such level as was required for the navigation below it. The plaintiffs then filed a bill in equity to restrain them from so letting down the water. The suit was compromised by an indenture which provided, "that the defendants might take and use, whenever they should consider it necessary or expedient for maintaining the navigation of the canal below the seventh lock, so much of the water of the canal as they should consider necessary or expedient for that purpose, subject to a weekly rent of 10*l.* for each and any week or part of a week in which the water above the seventh lock should be taken or used by the defendants for the purposes above mentioned."—On two occasions boats, having passed through the seventh lock, sunk; in order to raise them, the defendants emptied the lock, and the part of the canal immediately below the seventh lock; and then, having emptied the boats, refilled the canal between the sixth and seventh locks, by opening the sluices and letting in water from above. On another occasion the water having been let out of the canal between the seventh and sixth locks, for the purposes of enabling the defendants to get at the sixth lock to repair it, the defendants afterwards refilled that part of the canal by letting water down from above the seventh lock.

Held, that using the water for such occasional purposes was not taking or using water for the purpose of "maintaining the navigation of the canal" below the seventh lock: per Alderson, B., and Bramwell, B. (Martin, B., dissentiente.)

By a Canal Act the defendants were bound to make a weir at a particular part of the canal for the purpose of discharging all superfluous water into a reservoir for the benefit of premises occupied by the plaintiffs. The defendants in compliance with the requirements of the Act, erected the weir above the seventh lock. In 1844 more water was required for the navigation below the seventh lock than passed through the seventh lock when the sluices were

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formed across the river for the above purpose immediately below such artificial cut. This weir is the weir at Ynispenllwch mentioned in the 25th section of that Act. After supplying the mills, the water is again returned to the river by another short cut formed for the purpose.

In the year 1794 an Act was passed, 34 Geo. 3, c. cix, for making and maintaining a navigable canal from the town of Swansea, in the county of Glamorgan, into the parish of Ystradgynlais, in the county of Brecon, and the defendants were thereby empowered to supply the canal with water from all such rivers and watercourses as flowed within the distance of 2000 yards from the same. By the 25th section of that Act it was enacted, "that the said company of proprietors should, at their own proper costs and charges, make and erect, and for ever afterwards maintain and keep in good repair, one or more waste weir or weirs, on the side of the said canal, at or near a place called Ynispenllwch, for the purpose of discharging all superfluous water therefrom, and should conduct and convey all the water which should be discharged from the said canal, at such weir or weirs, or at any other weir or weirs which the said company might think proper to make above the same, into the cut or reservoir belonging to Ynispenllwch Tin Works, at some place above the weir, at Ynispenllwch opposite Ynisymon, across the said river, belonging to the mills in the occupation of the executors of the late John Miers, Esq., deceased, so that the said occupiers might have the benefit of such waste water: and that no other waste weir should be erected on the side of the said canal, nor any superfluous water be discharged from the said canal, by any means whatever, anywhere between the weir, or weirs, so to be erected at or above Ynispenllwch aforesaid, and the first lock which should be erected on the said canal below the same, and which lock was intended to be made at or

near Clydoch: and that such lock below, as well as the said weir, or weirs, so to be made and erected at near or above Ynispenllwch as aforesaid, should respectively, at all times, be kept in good and substantial repair and condition by the said company of proprietors."

The canal was made under the powers of the Act, and ran for the greater part of its course parallel with the river Tawe, and in many places within 2000 yards thereof; and the company, in making the same, formed, at several such places, cuts from the said river into their said canal, at points above the weir before mentioned, and thereby supplied the canal with water from the said river, and this mode of supply has continued from that time to the present. The company, in compliance with the 25th section of their Act, erected on the side of the canal near Ynispenllwch a waste weir, for the purpose of discharging all superfluous water discharged from the canal, and the water discharged from the canal at such weir was conducted by a cut or channel into the river Tawe, above the weir on the river: so that the water so discharged found its way to the mills, through the artificial cut above that weir from the river to the works. At a short distance below the waste weir thus created on the canal, the company constructed and placed in the canal a lock and lock gates; such lock being the seventh lock in the canal. This lock was below the level of the eighth lock on the said canal and above the level of the sixth lock on the same. All the works on the canal were completed before the year 1800.

In the year 1844, a great scarcity of water existed, both in the said canal and the said river; and the company, on several occasions, when no boat was passing or about to pass through the seventh lock, caused the sluices in the gates of that lock to be opened, and the water to pass from the upper part of the canal above that lock into the canal

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below the same, for the purpose of maintaining the navigation below the seventh lock, whereby the plaintiffs, as the occupiers of the mills, were deprived of the benefit of water which would otherwise have passed to the same.

In July, 1844, the plaintiffs filed a bill in Chancery against the Company for an injunction, praying to restrain the Company from opening, or allowing or permitting to be opened, the gates or sluices of the seventh lock, (except for the passing and repassing of boats and other vessels through such lock), and from preventing all the superfluous water of the canal flowing over the said waste weir to the said tin works and mills, as the same had ordinarily flowed. And in January, 1845, they commenced, by permission of the said Court, an action at law against the Company, to recover damages in respect of such acts, but such proceedings were determined and compromised by the parties on the terms and conditions in the deed next mentioned.

By an indenture, made the 1st day of July, 1845, between the plaintiffs of the one part and the defendants of the other part, after reciting (in substance) the various matters hereinbefore mentioned, it was declared "that the said Company of proprietors of the Swansea Canal Navigation, and their successors, shall be at liberty, at any time hereafter, during all the residue and remainder of the aforesaid term of sixty years, &c., by opening the sluices in the gates of the said seventh lock on the said canal, at other times than when boats, barges, or other vessels navigating the said canal shall be passing or about to pass through the seventh lock, *to take and use, from time to time, and as often as the said Company of proprietors and their successors shall consider necessary or expedient, for the purpose of maintaining the navigation of the said canal below the said seventh lock, so much of the water of or in the said canal above the said seventh lock as they the said Company*

of proprietors and their successors shall consider necessary or expedient for that purpose, subject, nevertheless, to a weekly rent of 10*l.*, to be paid to the said William Llewellyn the elder, &c., and for each and every week, or any part of a week, in which the water in the said canal above the seventh lock shall be taken and used by the said Company of proprietors, or their successors, (except as hereinafter is mentioned), for the purposes and in the manner lastly hereinbefore mentioned; such several weekly rents or sums of 10*l.* to be paid half yearly, on the 25th day of March and the 29th day of September, in every year, and each week to be considered as commencing at midnight on every Saturday night throughout the year: provided always, that it shall be lawful for the said Company of proprietors, once in every year, to let out the water from the said canal, for the purpose of emptying, cleansing, and repairing the whole or any part thereof, and also to refill and make navigable the said canal without being liable to pay, to the said parties hereto of the first part, the aforesaid, or any rent or sum of money, but so, nevertheless, that the time occupied in refilling the said canal shall not exceed the period of seventy-two successive hours: Provided also, that the water of the said canal, above the said seventh lock, shall not be let out for the aforesaid purposes, by or through, or by means of the said seventh lock of the said canal, or the sluices or gates of such lock, but the same shall be let or passed out of the said canal into the river Tawe or Swansea river, at a point near to the eighth lock of the canal, by, or through, or by means of a sluice-gate now existing at or in the side of the said canal, near to such last mentioned lock, and a watercourse also now existing, and which communicated between the said last mentioned sluice-gate and the aforesaid river Tawe. And the said Company of proprietors do hereby covenant, during

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all the residue of the said term of sixty years, &c., to pay to the said William Llewellyn the elder, &c., the said weekly rents or sums of 10*l.*"

The seventh and other locks of the said canal are left nearly empty after the passing of a boat.

On the morning of the 22nd November, 1852, a boat, navigating down the said canal towards Swansea, was passed into the seventh lock, and for the purpose of passing the boat into such lock, enough water to fill the lock was taken in the usual way from above the seventh lock, to float the boat into the lock, and the sluices in such gate were closed. The boat subsequently sunk in the lock, and in order to raise the boat, the company let off the water out of the seventh lock, that is, the water held by and between the upper and lower gates of that lock, and out of the pond or portion of the canal between the seventh lock and the sixth lock, and thereby lowered the water in such lock and pond. The water was then baled out of the sunken boat, and the sluices in the upper gate of the seventh lock were opened; the seventh lock and the pond were then refilled with water, let through the sluices of the upper gate of the seventh lock from above that lock. But for such letting off of water out of the seventh lock and out of the pond, and such lowering of the water, and such refilling of the seventh lock and of the pond, the said upper gate of the seventh lock and the sluices therein would have remained closed from the time when the same were closed after the said boat had been passed into the lock until another boat was passing or about to pass through such lock. The water, so taken and let through the sluices of the upper gate of the seventh lock, would otherwise have passed over the weir at the side of the canal, to the river Tawe and the plaintiffs' works. The boat might have been raised, by emptying out the water from the seventh lock, by means of pumping machinery, and

afterwards refilling such lock, to the level of the water in the pond between the sixth and seventh locks, by means of the sluices in the lower gates of the seventh lock, without altering the level of the water above the seventh lock; but no such pumping machinery was then, or had been previously, fixed or erected along the line of the canal.

On the 1st of March, 1853, the sluices in the gates of the seventh lock were again opened by the company, and the water of the canal above such lock was allowed to pass through the lock, into the portion of the canal below such lock, when no boat, barge, or other vessel navigating the said canal, was passing or about to pass through the said seventh lock. This was done for the purpose of refilling the pond or portion of the canal between the sixth and seventh locks, which had been emptied to enable the servants of the company to do some repairs to the sixth lock.

On the 14th of April, 1853, the company again caused the sluices in the gates of the seventh lock to be opened, and water to pass through, under the same circumstances as on the 22nd of November, 1852.

Upon no one of the three several occasions was the water let out of any other parts of the canal than those above mentioned, nor was any part of the water, on any of such occasions, let or passed out of the said canal into the river Tawe, at the point mentioned in the said indenture, near to the said eighth lock.

The plaintiffs claimed of the defendants, under the provisions of the said indenture, payment of the sum of 10*l.* in respect of the opening of the sluices in the gates of the said seventh lock, and allowing the water of the canal to pass the same on each of the said occasions respectively. The company have refused to pay either of such sums. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover either, and which of the

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above sums. If the Court shall be of opinion that they are entitled to recover, judgment is to be entered for the plaintiffs, by confession, for such sum as the Court shall direct, with costs of suit. If the Court shall be of a contrary opinion, judgment of nol. pros. is to be entered.

*Phipson* argued for the plaintiffs (June 16).—The question as to what is superfluous water, does not arise in the present case. It was fully discussed in *Blakemore v. The Glamorganshire Canal Company* (*a*). On the authority of that case the plaintiffs would contend, if it were necessary, that according to the true construction of the Act for making the canal, 34 Geo. 3, c. cix., all water not used for lockage purposes, is to be deemed superfluous water. The plaintiffs, relying on that construction of the Act, filed a bill in Chancery to enforce it against the defendants. Leave was given to the plaintiffs to bring an action; and the deed in question was the compromise of those proceedings. The effect of it is, that the Company have a right to take water at all times, in order to pass boats through the locks; but that all the water which is not lockage water, is to pass over the weir of the plaintiffs, with certain defined exceptions, one of which is, that the defendants are to be at liberty to refill the canal in a particular manner, after cleansing it. The Company may take any water they require for the purpose of maintaining the navigation, but they must pay for it. Here, in order to raise the sunken boat, a much larger quantity of water was taken through the seventh lock than would have been necessary for the ordinary passage of a boat. It was used to refill the canal and maintain the navigation. For the repairs, the lock and pond between locks six and

(*a*) 2 C. M. & R. 133. See *Canal Company v. Blakemore*, 1 further S. C. 3 Y. & J. 60; 1 M. Cl. & F. 262. & K. 186; *The Glamorganshire*

seven were emptied and afterwards refilled. A large quantity of water was thus taken for the purpose of maintaining the navigation, which the defendants are bound to pay for. [Bramwell, B.—Are the plaintiffs entitled to the rent of 10*l.* per week for an isolated act, without any continuous abstraction of the water? Martin, B.—I suppose it is admitted, that if the 10*l.* is paid, the defendants can use the water in any way they please for a week.]

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*Lush*, for the defendants.—The deed was not intended to meet such cases as those now under the consideration of the Court. It recites the making of the canal, and that the supply of water had been found inadequate. The Company had contended, that no water wanted for the canal was superfluous; the plaintiffs said, that all water not required for the purpose of lockage was superfluous. The effect of the compromise is, that the Company may take whatever quantity of water they require for maintaining the navigation, on payment of the weekly rent. The covenant is framed with reference to the recital, that the supply of water in the canal had been found inadequate. It was never contemplated by either of the parties, that if a small quantity of water should be required to refill a pond, after repairing the lock and gates, the penalty should become payable, and therefore they did not insert any covenant to restrain the canal proprietors from doing acts which are merely incidental to the use of the water in the ordinary way for lockage purposes.

*Phipson*, in reply.—The question is, what is maintaining the navigation? It is conceded by the defendants, that if this water was used for maintaining the navigation, it must be paid for. If a scarcity arises from drought, it is admitted that the water used to supply the deficiency must be paid

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for. Surely then, if the defendants take water to supply a scarcity caused by their own acts, they must pay the penalty.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

ALDERSON, B.—My brother *Bramwell* and I myself are of opinion, that the defendants are entitled to judgment. My brother *Martin* differs from us, but does not deem it necessary to deliver any formal judgment. The covenant alleged to be broken is the covenant to pay rent reserved as follows:—“That the defendants shall be at liberty, by opening the sluices in the gates of the said seventh lock on the said canal, at other times than when boats, barges, or other vessels navigating the said canal, shall be passing or about to pass through the said seventh lock, to take and use, from time to time, and as often as the said Company of proprietors and their successors shall consider necessary or expedient, for the purpose of maintaining the navigation of the said canal below the said seventh lock, so much of the water of or in the said canal, above the said seventh lock, as they the said Company of proprietors and their successors shall consider necessary or expedient for that purpose, subject nevertheless to a weekly rent or sum of ten pounds, to be paid to the said William Llewellyn the elder, Llewellyn Llewellyn, William Llewellyn the younger, John Rowland, and James Burt, their executors, administrators, or assigns, for each and every week, or any part of a week, in which the water in the said canal, above the seventh lock, shall be taken and used by the said Company of proprietors of the Swansea Canal Navigation, except as hereinafter is mentioned and provided, for the purposes and in the manner lastly hereinbefore mentioned.” There are

three occasions on which, as the plaintiffs say, the water was used by the defendants within the meaning of this covenant. The first and third are cases where a boat, having passed into the seventh lock, sunk, and in order to raise it, the defendants emptied the lock, and the part of the canal between the seventh and sixth locks, and then having emptied the boat, refilled the canal between the seventh and sixth locks, opening the sluices and letting water in from above the seventh lock for that purpose. The other case was, that the water having been let out of the canal, between the sixth and seventh locks, for the purpose of getting at the sixth lock to repair it, the defendants afterwards refilled that part by opening the sluices of the seventh lock, and letting the water in for that purpose.

Now the question is, if any, and which of these occasions, is "taking or using water for the purpose of maintaining the navigation of the canal below the seventh lock"? If that expression naturally comprehended the cases in question, it would require strong considerations of convenience or necessity to limit its meaning. But we can put no meaning on that expression, except in reference to the surrounding circumstances, and the other parts of the deed. Now the deed originated in this way. By the defendant's Act, they were bound to make a water weir at a particular part of the canal, for the purpose of discharging all superfluous water into a reservoir for the benefit of the premises now occupied by the plaintiffs. These requisitions they complied with; but it appears that in 1844, there being a drought, more water was required for the navigation below the seventh lock, than passed through the seventh lock when the sluices were opened for the passage of boats through the lock. This probably arose from there being more traffic below the seventh lock than above it, and from the feeders below the seventh lock failing. The defendants

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to supply this deficiency, let water down from above the seventh lock, to maintain the water at such level as was required for the navigation below it. Of this the plaintiffs complained, and filed a bill in equity; the result was that compromise which is contained in the indenture declared on. Then what was the claim which the plaintiffs made, and of which the defendants purchased the abandonment? The defendants might claim, that no water was superfluous which they wanted for any purposes of the canal, from the seventh lock to its termination. The plaintiffs might claim, that all water was superfluous, except that which was required for the passing of boats through the seventh lock. One of these contentions might be well founded, or the truth might be midway, and the defendants have a right to all water for lockage, and for occasional requirements, such as those which have arisen and given rise to this action, but not to a permanent supply for the lower navigation. It is not necessary to say which we think right, but it seems to us clear that there is no pretence for that construction which gives the defendants a right to no water except what was required for the passing of the seventh lock alone. It seems to us impossible to suppose, that water was superfluous which was necessary to fill the part between lock six and lock seven, when it had become empty by such temporary accidents as those in question, or by an accidental leaking, or breaking of the works or banks of the pond of the canal, between the seventh and sixth locks. It is true that the plaintiffs in their bill prayed that the defendants might be restrained from opening the sluices of the seventh lock, except for the passage of boats. But the prayer of the bill must be read in connection with the facts stated; and we think, as it cannot be supposed that the plaintiffs were making a claim which appears to us unreasonable, it must be taken that the claim made by them was of the

character we have mentioned ; that that was the claim compromised, and that the defendants were not purchasing a right which we think they clearly possessed before, viz. a right to use the water for such purposes as those for which they used it in the three instances in question. It seems to us, therefore, that the expression "taking and using water for the purpose of maintaining the navigation of the canal below the seventh lock," in the indenture, means a feeding of the pond of the canal below the seventh lock, by water coming from above it and not passing in the ordinary using of the lock. The words are, "maintaining" the navigation, or keeping it in operation, and not an incidental filling a part of the canal ; and it is "the canal" which means, we think, the whole canal below the seventh lock, and not a bit or part of the canal.

This construction is confirmed by the rent reserved being weekly, and shewing that it was supposed that a continuous subtraction of water would take place. Consequently we think it does not include such cases as the instances mentioned in this case. It was urged that the proviso permitting the emptying of the canal, or any part, for repairs once a year, without payment of rent, shewed, that on other occasions, they were to pay. To this we do not agree. The clause was put in *ex majori cautelâ*. It contemplates the annual cleansing of the whole canal, the refilling after which might be supposed to be within the expression "maintaining the navigation," and it supposes that the water let out, or some of it, will be let out above the seventh lock, which is not the case here ; and it seems to us clear that this clause, for the benefit of the defendants, cannot have the effect of making them liable to pay if they empty and refill the part of the canal below the seventh lock, when occasional repairs have suddenly and perhaps

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accidentally become necessary, in order that the ordinary navigation may continue. It is further to be remarked, that Mr. *Phipson* was compelled to contend that the defendants could never let any water down, except when boats were passing the lock, and consequently compelled to contend, that either the plaintiffs must have made, what we consider so unreasonable a claim as we have mentioned, or that if they did not, still in some way they have a right to be paid when water is taken, which clearly is necessary for the passage of boats through the seventh lock and the pond below it, which is, in truth, an extension of the lock itself, and which the defendants were therefore at liberty to take.

Moreover, if this is the meaning, why does not the deed say that the payment is to be made whenever water is passed otherwise than for the use of the lock? That the plaintiffs really claimed to be paid, or the defendants intended to pay for such cases as the present, we cannot believe.

We therefore hold that as to the two cases where, in passing through the seventh lock, the vessel sunk—the necessary expenditure of water arising therefrom, was water expended in the passage of the vessel, through the seventh lock, and no payments of ten pounds in respect of these accidents became due.

As to the remaining ten pounds, we think an accidental and temporary repair to the pond between the seventh and sixth locks was an expenditure of water of the same description; an expenditure of water, in the course of vessels navigating, and necessarily passing through the seventh lock. This, also, the plaintiffs have no right to recover, and therefore we must give judgment for the defendants altogether.

I believe my brother *Martin's* difficulty arises more in respect to the last of the three points than to the two which relate to the vessels which sunk in the passage through the lock.

Judgment for the defendants.

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THE declaration stated—that the plaintiff was possessed of a house as tenant thereof to one Eliza Crane, at a certain rent therefore payable by the plaintiff to the said Eliza Crane; and was also possessed of a certain agreement for a lease of the said house, whereby the said Eliza Crane agreed to grant to the plaintiff a lease of the said house; of all which the defendant had notice before the making of the agreement thereafter mentioned; and thereupon an agreement was made between the plaintiff and the defendant of and concerning the premises in the words and figures following, that is to say:—"Dear Sir (meaning the plaintiff), I (meaning the defendant) agree to purchase from you for the sum of 175*l.* sterling your agreement for a lease of premises, No. 1, Neate Street, &c. (meaning the said house), for the unexpired period of 45 years, or thereabouts, at the annual rent of 70*l.*, and I agree to pay the expence of executing the lease to me."—Which said agreement was signed by the defendant. And in consideration that the plaintiff, at the request of the defendant, then promised the defendant to sell to the defendant his said agreement for a lease, the defendant then promised the plaintiff to purchase the said agreement for a lease, and to perform the said agreement on his part. Averments.—That the plaintiff hath always been ready to sell the said agreement, and hath done all things, &c.; and that all things had happened, &c., so as to entitle him to have

Upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease.

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the said agreement for a lease purchased by the defendant, and to entitle him to be paid by the defendant the said sum of 175*l.* Breach: that though a reasonable time had elapsed, &c., yet the defendant had made default in purchasing the said agreement for a lease, and in paying the said sum of 175*l.* Special damage.

Pleas.—First, that the plaintiff did not, though he was duly requested, &c., deliver to, or furnish the defendant with such an abstract of title as he was, by virtue of the said agreement, bound to deliver or provide.

Secondly:—That the plaintiff did not, though he was requested, &c., deduce and shew a good or sufficient, or any right or title in the said Eliza Crane, or any other person, to the said house and premises, or to demise the same for the term which in and by the said agreement was agreed to be demised and granted.

Thirdly:—That the said Eliza Crane had not a good or sufficient title to the said house and premises or to demise, nor could she demise, the same for the said term which in and by the said agreement was agreed to be demised and granted.

To these pleas the plaintiff demurred, and the defendant joined in demurrer.

*O'Malley*, in support of the demurrer.—The plaintiff did not agree to sell an estate or interest in the term. He sold what he had, which was the agreement, and the defendant will have the same right under the agreement which the plaintiff had.

*Dowdeswell*, in support of the pleas.—The third plea is valid. It shews that a condition, which is implied in such an agreement as that declared on, has not been fulfilled. The substance of the contract is, that the defendant agreed to purchase, not a mere piece of waste paper, but an equi-

table interest in the land. In *Souter v. Drake* (*a*), where the law on the subject underwent a full consideration, it was decided that upon any contract for the sale of an existing lease there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and therefore that the purchaser has a right to call for proof of the lessor's title before he parts with his money. Indeed it is a general rule, that on any agreement relating to the sale of land, there is an implied condition that the purchaser shall have a right to call for evidence of the seller's title. Here it is shewn affirmatively that the grantor had no title (*b*). [Alderson, B.—In every contract for the sale of a lease the agreement is to sell an interest in the land: that is not so in the case of the sale of an agreement.]

ALDERSON, B.—I am of opinion that there must be judgment for the plaintiff. The question is one which depends upon the words of the contract. It has been decided that the grant of a lease means the grant of an absolute right of enjoyment for a certain number of years, and there is therefore on the sale of a lease an implied term that the vendor shall shew the lessor's title. Here there is merely the purchase of an agreement. Whatever benefit the agreement gave to the plaintiff, the defendant is entitled to. It is utterly uncertain what the terms of the agreement between the plaintiff and Eliza Crane are; but any right which the defendant may have to call for proof of the lessor's title rests upon that agreement, and must be the right which the plaintiff had against Eliza Crane, and which by the contract is transferred to the defendant.

(*a*) 5 B. & Ad. 992.

*Betty*, 4 M. & G. 410; *Shepherd*

(*b*) He referred to *Roper v. Keatley*, 1 C. M. & R. 117.  
*Coombs*, 6 B. & C. 534; *Hall v.*

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BRAMWELL, B.—I am of the same opinion. The declaration states a contract by the defendant to purchase all the right which the plaintiff possessed by virtue of an agreement for a lease made with Eliza Crane. If it was part of that agreement that Eliza Crane should shew her title, the defendant may compel her to do so, or if she refuses, may sue her and get compensation: if it was not part of the agreement with her, he cannot complain, having purchased the plaintiff's agreement such as it is.

Judgment for the plaintiff.

June 16.

HILL v. COWDERY.

A trader assigned his household furniture by a mortgage deed which provided that the trader should quietly enjoy until default had been made in payment after demand. The deed contained a covenant by the trader not to execute, do or suffer any act, deed, matter or thing, by means of which the premises should be assigned, charged, or prejudicially affected; or whereby the mortgagee might be hindered from receiving, recovering or taking possession of the same. Held, that filing a declaration of insolvency in pursuance of the 70th section of the Bankrupt Law Consolidation Act, 1849, while the goods were allowed to remain in the possession of such trader was a breach of the covenant.

THE declaration stated that by indenture, dated the 23rd November, 1852, the defendant, in consideration of 250*l*. paid to him, did assign and transfer to the plaintiff certain household furniture, goods and chattels, &c., which furniture, goods, &c., at the time of the making of the deed were in the possession of the defendant: To hold the same to the plaintiff, his executors, &c., as and for his and their own property, but subject to a proviso that if the defendant should pay to the plaintiff, on demand in writing to be made as therein mentioned, the sum of 250*l*. the plaintiff would reassigned the said household furniture, &c., to the defendant, but if default should be made in such payment, then it should be lawful for the plaintiff to enter on the lands, &c., of the defendant, and to remain and thenceforth to hold the said household furniture, &c., or to sell and dispose of the same, and to apply the proceeds thereof in payment of

According to the practice in the Court of Exchequer, when there are cross-demurrers which go to the whole cause of action, the party first demurring is entitled to begin.

the sum of 250*l.*, and to pay the surplus (if any), to the defendant, his executors, &c. And the defendant covenanted "not to execute or do, or suffer to be done or executed, any act, deed, matter or thing by means of which the effects and premises thereby assigned, or intended so to be, should be assigned, charged or prejudicially affected, or whereby the plaintiff might be hindered from receiving or taking possession of the same." And it was further provided that until default should have been made in payment after demand, it should be lawful for the defendant to hold, make use of and enjoy the said household furniture, &c., without interruption by the plaintiff. Averments:—that after the making of the said indenture the defendant remained in possession without any demand having been made; that the 250*l.* remained due until the time of the committing the act of bankruptcy hereinafter mentioned; that before and at the time of the making of the indenture the defendant was a trader and subject to the bankrupt laws; that after the making of the indenture, to wit, on the 28th of April, 1854, the defendant, so being a trader, was indebted to one T. Green in 80*l.* and to other persons in other sums of money, and the furniture being in the possession of the defendant, and in his possession, order, and disposition with the consent of the plaintiff, the real owner thereof, the defendant, not regarding his covenant, filed in the office of the Chief Registrar of Bankruptcy a declaration in writing in the form in schedule D. to the Bankrupt Law Consolidation Act, 1849, signed by the defendant, and attested, &c. that he was unable to meet his engagements; that afterwards, on the same day, a petition of the said T. Green for adjudication of bankruptcy against the defendant was filed, upon which the defendant was adjudicated a bankrupt: that after the act of bankruptcy had been committed, and before the adjudication, and before the plaintiff had made

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any demand for payment, the plaintiff had notice of the act of bankruptcy, and that after the defendant had become a bankrupt the household furniture, goods, &c., were seized by the assignees, and by them disposed of for the benefit of the creditors; that by reason of the act of bankruptcy the furniture, &c. and said assignment thereof were prejudicially affected, and the plaintiff was prevented and hindered from recovering, receiving, or taking possession of the said furniture, &c. contrary to the covenant of the defendant.

Plea.—That the Court of Bankruptcy did not, nor did any commissioner, &c., before this suit order the said furniture, &c. to be sold and disposed of for the benefit of the creditors of the defendant, &c.—The defendant also demurred to the declaration.

The plaintiff joined in the demurrer to the declaration, and demurred to the plea. He also replied to the plea,—That the circumstances under which the defendant held the goods, were such as to bring the said furniture, goods and chattels within the operation of the 135th section of the Bankrupt Law Consolidation Act, 1849, and to entitle the said assignees to obtain such order at any time.

Demurrer to the replication and joinder therein.

Hayes, Serjt., for the plaintiff.—Where there are cross demurrs the plaintiff is entitled to begin. *Petersdorff*.—Here the defendant demurs to the whole declaration. [*Alderson*, B.—In this Court we have always held that the party who first demurs is entitled to begin (a).]

Petersdorff, in support of the demurrer to the declaration.—The defendant does not covenant that he will not become bankrupt. But unless the covenant will bear that

(a) See Archbold's Practice, 710; *Earl of Falmouth v. Thomas* by Chitty and Prentice, 869. *mas*, 1 C. & M. 89.
Hilton v. Earl Granville, 5 Q. B.

construction, there has been no breach of it. The covenant is, that the defendant will do no act which will directly affect the interest of the covenantee; there is no provision against acts which indirectly and by the intervention of law may have that operation. Here the interest of the covenantee was not directly affected. The distinction between acts which a party does voluntarily, and those which pass in *invitum*, was pointed out by the Court of King's Bench in the case of *Doe d. Mitcheson v. Carter (a)*, and acted on by the Court of Exchequer Chamber in *Croft v. Lumley (b)*, and applies in the present case. In filing this declaration of insolvency, the defendant merely yielded to the bankrupt laws. The act was one which it was the duty of an insolvent trader to do. It was not a necessary consequence that the interests of the covenantee would be prejudicially affected. It was not certain that bankruptcy would follow. The bankruptcy was not brought about by the act of the defendant himself, but by the filing of the petition for adjudication by the creditor (*c*). The injury to the plaintiff is the indirect consequence of a lawful act. If a clergyman gives a judgment which *may* charge a benefice, it is legal, though an express charge would be unlawful. A covenant by a feme sole not to assign is not broken by her marriage. If the covenant is to be read as a covenant not to become bankrupt, it is contrary to the policy of the law, and void.

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Hayes, Serjt., for the plaintiffs.—The covenant is not merely that the defendant will not assign or charge the goods, but that he will do no act whereby they may be prejudicially affected. In *Doe d. Mitchenson v. Carter* (*a*), and *Croft v. Lumley* (*b*), the question was, whether the warrant of attorney was a direct charge. As to the argu-

- (a) 8 T.R. 57. (b) 5 E. & B. 648, 688.
(c) 12 & 13 Vict. c. 106, s. 70.

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ment, that the covenant is contrary to the policy of the law, it is not easy to see that it is in accordance with public policy that one man should pay his debts with another's money. From the consequences of having done that, the defendant seeks to escape.

Petersdorff replied.

ALDERSON, B.—This is an action for a breach of covenant, and I am of opinion, that the plaintiff is entitled to judgment. The declaration is well framed: it states a conveyance by way of mortgage of certain household furniture, goods, and chattels, which were to continue in the possession of the defendant, without interruption by the plaintiff, until default should have been made in payment of the sum of money secured by the deed; and that the defendant covenanted "not to execute or do, or suffer to be done or executed, any act, deed, matter, or thing, by means of which the effects and premises thereby assigned, or intended so to be, should be assigned, charged, or prejudicially affected, or whereby the plaintiff might be hindered from receiving or taking possession of the same." While the goods remained in the possession of the defendant, he executed a declaration of insolvency. Upon that an adjudication of bankruptcy was founded. The goods became liable to be seized by the assignees, and were in fact seized by them, as having been at the date of the bankruptcy in the order and disposition of the bankrupt, with the consent of the true owner. That appears to me to be the very contingency against which this covenant was intended to provide. The act done by the defendant was one by which the goods were prejudicially affected, and whereby the plaintiff was hindered from taking possession of the same. The breach, therefore, is well assigned, and the plaintiff is entitled to judgment.

MARTIN, B., concurred.

BRAMWELL, B.—It is difficult to see what would have been a breach of this covenant, if the act of the defendant in filing the declaration of insolvency was not so. I do not know what could have been the meaning of the covenant, if it was not intended to apply to a case like the present. It has been argued, that the covenant was illegal, as being contrary to the policy of the bankrupt laws. I cannot think that it is unlawful for a person to covenant that he will not voluntarily become bankrupt while the goods of the covenantee are allowed to remain in his possession as reputed owner. That being so, I think that the covenant was meant to meet the very case that has occurred. Indeed I do not see to what else it could apply. No covenant was necessary to prevent the defendant from selling the goods; nor against permitting them to be distrained. The covenant is, not that he will not create a second mortgage, but that he will not suffer any act to be done whereby the premises may be charged, &c. And there is no reason why the words should not be construed literally. I subscribe to the doctrine laid down in *Croft v. Lumley*(a), in the Exchequer Chamber, viz., that when a person covenants that he will not do an act, he does not break his covenant if he does an act which indirectly brings about the result provided against. For example—if the defendant incurred a debt of 100*l.*, that would be an act which might lead to something else, whereby the goods might be charged. Here the liability to charge was the immediate consequence of the defendant's act.

Judgment for the plaintiff.

(a) *Croft v. Lumley*, 5 E. & B. 648, 688.

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LANGTON v. HAYNES.

A bill of exchange given before the 10th August, 1854, in pursuance of an usurious contract for the loan and forbearance of money upon the security of land, is not rendered valid by 2 & 3 Vict. c. 37.

THE declaration was upon a bill of exchange payable twelve months after date, and indorsed by the defendant to the plaintiff.—There was also a count for money lent.

Plea.—That the bill was indorsed, and the money lent, in pursuance of a corrupt and illegal contract made before the 10th day of August, A.D. 1854, between the plaintiff and the defendant, for the loan and forbearance of money by the plaintiff to the defendant, whereby money and interest above the rate of 10*l.* for the forbearance of 100*l.* by the year was reserved and agreed by the defendant to be paid to the plaintiff, contrary to the form of the statute in such case made and provided; and that the said bill was indorsed by the defendant to the plaintiff to secure to him the payment of the money lent at such usury, and the said usury, and the said money lent and usury, formed and was the consideration for the indorsement and payment by the defendant of the said bill; and that the said money lent was lent at such usury.

Replication.—That the bill was indorsed and the money lent and the contract made, as in the defendant's plea alleged, after the making and passing of the 2 & 3 Vict. c. 37.

Rejoinder.—That the contract in the said plea mentioned was a contract for a loan upon the security of lands, tenements and hereditaments, and an estate and interest therein, within the true intent and meaning of the 2 & 3 Vict. c. 37, and that the money in the plea mentioned was lent and forborne upon such security.

Demurrer and joinder.

Bovill, in support of the demurrer.—The bill of exchange declared on is rendered valid by 2 & 3 Vict. c. 37. The defendant will rely on the case of *Hodgkinson v. Wyatt* (*a*). That was an action on a bond, part of the condition of which was, that title deeds should be deposited to constitute an equitable mortgage of the land: the bond could not be separated from the security on the land. The Lords Justices in *Ex parte Warrington* (*b*): and the Lord Chancellor in *Lane v. Horlock* (*c*), have severally expressed their opinion that advances made on bills of exchange, not having more than twelve months to run, are within the protection of 2 & 3 Vict. c. 37, though secured upon land. That is in accordance with the doctrine laid down by *Page Wood*, V. C., in *James v. Rice* (*d*), and *Kindersley*, V. C., in *Lane v. Horlock* (*e*). [Alderson, B.—Those cases were considered in this Court in the case of *Fussell v. Daniel* (*f*), and were disapproved of.]

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*Keane*, contrà.—The words of the exception in 2 & 3 Vict. c. 37, are,—“Provided that nothing herein contained shall extend to the loan or forbearance of any money upon the security of any lands, tenements or hereditaments, or any estate or interest therein.” Loans upon such security remained untouched by that statute, and were therefore subject to the operation of the 12 Anne, stat. 2, c. 16. The whole contract for the loan remains illegal, as it was before the passing of the 2 & 3 Vict. c. 37; and yet the Courts of Chancery have said that everything is rendered valid except the security on land.

ALDERSON, B.—I am of opinion that there must be judg-

(*a*) 4 Q. B. 749.

(*d*) 1 Kay. 231.

(*b*) 3 De Gex, McN. & G. 159.

(*e*) 1 Drewry, 587.

(*c*) 5 H. L. C. 580.

(*f*) 10 Exch. 581.

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ment for the defendant. The point was decided by the Court of Queen's Bench in the case of *Hodgkinson v. Wyatt*. By the statute of Victoria no contracts for loans at usurious interest upon the security of land are validated, and if not rendered valid they are illegal by the statute of Anne. Contracts for loans secured upon land, made before the 10th August, 1854, remain as they were before the 2 & 3 Vict. c. 37, and if a loan on such security at usurious interest be the consideration for a bill or note, such consideration is illegal.

BRAMWELL, B.—I am of the same opinion. On principle the case appears free from doubt. The contract of loan and forbearance at usurious interest is prohibited by the statute of Anne. Does the statute of Victoria legalise it? That statute does not extend to any case where the loan and forbearance are upon the security of any lands. The only question is, was the loan made upon such security? The statute does not, in distinct terms, provide that the security shall be invalid, but it leaves the whole contract, as it was before, illegal.

Judgment for the defendant (a).

(a) See 17 & 18 Vict. c. 90.



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## BLAGRAVE v. THE BRISTOL WATERWORKS COMPANY.

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THE second count of the declaration stated, that the plaintiff was possessed of certain lands in the parish of Barrow Gurney in the county of Somerset, and by reason thereof was entitled to the benefit of having the water of a certain natural stream, called Elwall Stream, flow at a certain speed at that part of the course of the stream where it arrived at the lands of the plaintiff: yet the defendants wrongfully, vexatiously, and maliciously raised the level of the water of the said stream until it approached the part of the stream where the same arrived at the land of the plaintiff, and just before it reached the last mentioned part of the stream made steps for the water to flow down and caused the water to flow down such steps, and thereby and by other contrivances caused the water of the stream at the said part of the course of the stream where the same arrived at the lands of the plaintiff, to flow, and the same thereby did flow, at much less speed than it heretofore had naturally flowed: by reason whereof the water of the stream became of much less use and value to the plaintiff, &c.

obstructed the way; whereby the plaintiff and his servants, employed in the management of his lands and in tending his cattle, were compelled to go by a longer route, and thereby the work and labour of the plaintiff and his servants were necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess as he otherwise would have done. *Held*, a sufficient allegation of peculiar damage to enable the plaintiff to maintain the action.

It is no ground of action that a person, by stopping up on his own land the continuation of a public footway over his neighbour's land, causes the public to trespass on other parts of his neighbour's land, to his damage.

A statute, incorporating a Waterworks Company, provided that all disputes respecting compensation, works, matter, or thing done or performed under the provisions of the Act should be determined by arbitration, under "The Lands Clauses Consolidation Act, 1845." *Held*, that the provision did not apply to a claim for compensation in respect of damage sustained by the interruption of a drain by reason of the works of the Company.

A plea to several counts, good as to some and bad as to the others is not bad in toto, but may be construed distributively.

It is no ground of action, that one party to a reference made a fraudulent representation to the arbitrator, whereby he awarded to the other party a less sum than he would otherwise have done.

In a count complaining that the defendant did an act on his own land to the prejudice of the plaintiff's land, it is not necessary to aver notice; and a plea stating that no notice was given is bad.

A declaration alleged that there was a public footway from a field of the plaintiff to another field of the plaintiff, and that the defendants

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Third count.—And the plaintiff further sues the defendants for, and complains of, the said raising of the level of the said stream and causing it to flow down steps as aforesaid as being, and the plaintiff says that it was, a wrongful taking and diverting and using of the waters, contrary to the form of the Bristol Waterworks Act, 1846, and against the will of the plaintiff: whereby the plaintiff also sustained damage of the like nature, &c.

Fourth count.—That the defendants were possessed of a certain reservoir of water and of great quantities of water therein, which reservoir and waters were under the care of the defendants. And the plaintiff was possessed of certain lands and buildings near the reservoir: Yet the defendants took such bad care of the reservoir and of the waters therein, that by reason of the defendants' want of care thereof, great quantities of the waters oozed and leaked out of the reservoir and flowed over and percolated into the lands of the plaintiff and under and about the said buildings, and caused offensive smells and vapours to spread themselves through the said buildings, and rendered the same the less fit for the uses for which they were intended, and also the buildings were made damp and unwholesome and part of the lands deteriorated in value.

Fifth count.—That the plaintiff was possessed of certain land and buildings near to certain land on which a reservoir of the defendants is now constructed, and was also possessed of certain other land also near to the land on which the reservoir is constructed; and by reason whereof the plaintiff was entitled to a way from and out of his first mentioned land, through and over certain other land towards, to, and into the plaintiff's secondly mentioned land, and back again, for himself and his servants on foot and with cattle, &c.: yet the defendants wrongfully made a deep cut or channel across the said way, and thereby deprived the plaintiff of the use and enjoyment thereof.

Sixth count.—That the plaintiff was possessed of a dwelling-house, called, &c.; and by reason thereof was entitled to have the sewerage of the said house flow away therefrom by means of a certain drain: yet the defendants wrongfully obstructed the drain, and thereby penned back the sewerage of the house so that it could not flow away therefrom; by means whereof offensive and noxious smells spread themselves about the house, and it became unwholesome, &c.

Seventh count.—That the plaintiff was possessed of certain lands adjoining the reservoir and works hereafter mentioned, and of a dwelling-house, called, &c.: and the defendants, being the corporation incorporated by the "Bristol Waterworks Act, 1846," formed and made a reservoir and works by that act authorized to be made: by reason of the making whereof, a certain drain, which, at the time of the passing of the said act was an existing then present drain whereby the said adjoining lands and house were drained, was interrupted and rendered useless; and by reason thereof it became and was, and the plaintiff says that it was, the duty of the defendants, according to the said act, to make and provide a drain for the use and occupation of the adjoining lands; and all things and rights were done, happened, and existed, necessary to entitle the plaintiff to have such drain made and provided by the defendants under and according to the provisions of the Act, and a reasonable time for the defendants to make and provide such drain, at their own expense, elapsed before this suit: yet the defendants made default in making such drain for the use and occupation of the said adjoining lands, and wholly omitted and neglected so to do, contrary to the said Act, and would not and did not undertake such drain: by reason whereof the said lands and house were insufficiently drained, and offensive smells infested the house and rendered it unwholesome, &c.

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Eighth count.—That the plaintiff was possessed of certain lands and certain other lands, both which lands adjoined the reservoir and works hereafter stated to have been formed by the defendants. And the defendants, being the corporation incorporated by "The Bristol Waterworks Act, 1846," formed and made a certain reservoir and works by that act authorized to be made, so as to lie between the lands in this count first mentioned and the lands in this count secondly mentioned; by reason of the making of which reservoir and works as aforesaid, a certain way, which, at the time of the passing of the said Act, was a then present way existing as and being means of communication between the lands first mentioned and the lands secondly mentioned, was taken away and wholly interrupted; and although a reasonable time for the defendants, at their own expense, to make and provide a convenient way or other means of communication between the lands first mentioned and the lands secondly mentioned, for the use and occupation of both the lands, according to the said act, elapsed before this suit, and all things and rights were done and existed, to entitle the plaintiff to have such way or other means of communication made and provided by the defendants, under and according to the said act; yet the defendants wrongfully made default in making and providing such way or other means of communication as aforesaid, and did not nor would make or provide the same, but wholly omitted and neglected so to do, contrary to the form of the said act, and did not nor would undertake the making and providing of such way, &c.: whereby the plaintiff was greatly inconvenienced and the lands became less valuable to him, &c.

Ninth count.—That the plaintiff was possessed of certain lands including a field called Hitten Wells Wood Ground, and of certain other lands forming part of what had been a field called the Fifteen Acre Piece, and there was and of right ought to be a public footpath for all the subjects of our

Lady the Queen to go, return, pass and repass on foot in and along the said footpath, &c., through and out of the field called Hitten Wells Wood Ground, into, through, and over certain other land, towards, unto, into and through the said part of the Fifteen Acre Piece and back again: Yet the defendants wrongfully constructed and made, and for a long time kept so constructed and made, upon and over the said footpath, in that part thereof which so as aforesaid lay between the said field called Hitten Wells Wood Ground and the part of the Fifteen Acre Piece, a large reservoir for water, and, during great part of the last mentioned time, kept great quantities of water in the said reservoir, and thereby then entirely obstructed the said footpath, and rendered the same utterly impassable by foot passengers: by means whereof the plaintiff was entirely deprived of the use of the said footpath, as a means of passing from the said field called Hitten Wells Wood Ground to the said part of the said Fifteen Acre Piece, and from the latter back to the field called Hitten Wells Wood Ground, which means of passing was of great use and value for the convenient occupation and enjoyment of the several lands whereof the plaintiff was so possessed as aforesaid; and by reason of the premises the plaintiff, and the plaintiff's servants by him employed in the management and enjoyment of the said lands, and tending and feeding of his cattle on the said lands, on divers occasions, when, for the purpose of managing and enjoying the said lands, and of tending and feeding the plaintiff's cattle on the said lands, and for the purpose of moving the plaintiff's goods from one part to another of the said lands, they would otherwise have passed on foot from the field called Hitten Wells Wood Ground towards, to and into the said part of the Fifteen Acre Piece along the said footpath, and on divers other occasions when for the like purposes they would otherwise

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have passed on foot from the said part of the Fifteen Acre Piece towards, to and into the field called Hitten Wells Wood Ground along the said footpath, were wholly prevented from so doing, and were compelled for the purposes aforesaid to go by another route much longer than by the said footpath, &c., and thereby valuable time and work and labour of the plaintiff and his servants were necessarily consumed, spent, done, and performed, to a greater extent than would have been if the plaintiff and his servants had not been deprived of the use of the said footpath as aforesaid, and thereby the plaintiff was prevented from employing his said servants during such excess of time as he otherwise would have done, and the management and enjoyment of the plaintiff's lands and the tending and feeding of divers cattle of the plaintiff on the said lands was more troublesome and laborious and expensive to the plaintiff, and consumed more time of the plaintiff and his servants, than they otherwise would have done.

Tenth count.—That during part of the time in this count mentioned, the plaintiff was possessed of part of a field called the Fifteen Acre Piece, and during the residue of the said time a certain other person was possessed thereof as tenant to the plaintiff, the reversion thereof belonging to the plaintiff, which tenant was a tenant at rack rent payable to the plaintiff; and there was a certain footpath for all the subjects of our Lady the Queen to go, return, pass and repass on foot, &c., towards, unto, and into the said part of the Fifteen Acre Piece from and along one side thereof, into and over certain land adjoining that part, towards and to a certain public highway: Yet the defendants by making and keeping a reservoir for and containing water upon the said land adjoining the said part of the Fifteen Acre Piece, entirely for a long time obstructed the said footpath there, and thereby caused during that time

divers persons who were desirous of passing, and otherwise would have passed, along the said footpath towards and to the said public highway, to deviate out of the said path in the said part of the Fifteen Acre Piece, and with their feet to walk and trespass upon the said part of the Fifteen Acre Piece in parts thereof where there was no footpath, and by the user thereof to form a beaten track across the said part of the Fifteen Acre Piece where there was no footpath, and to wear off in a permanent manner the grass and herbage from the said beaten track, and rendered it impossible for the plaintiff and his said tenant to prevent such trespasses from being committed; and rendered it much more difficult than it otherwise would have been for the plaintiff to prove that there was not a public footpath across the part where the said trespasses were committed. Whereby the plaintiff, while he was so possessed, was greatly disturbed, &c., and while the plaintiff's tenant was so possessed the plaintiff was greatly injured in his revolutionary estate and interest, &c.

Eleventh count.—That the plaintiff and defendants referred to arbitration (amongst other things) the amount of compensation to be paid by the defendants to the plaintiff for the damage which he would sustain by reason of the construction of a reservoir for water, then about to be constructed by the defendants near to a mansion house and lands of the plaintiff, and for which damage the defendants would have been bound to compensate the plaintiff: that the amount of such damage, and of the compensation therefore payable, depended in part upon the height to which the said reservoir would be constructed: that at the time of the said arbitration the height to which the said reservoir would be constructed was a matter not within the knowledge of the plaintiff, but depended upon the will and intention of the defendants: Yet the defend-

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ants well knowing the premises, wrongfully and maliciously and fraudulently caused it to be represented to the arbitrators under the said reference, that they intended to construct the said reservoir to the height of thirty feet and no more: whereas the defendants did not, at the time of causing the said representation to be made, intend to construct the same to the height of thirty feet and no more, but either had not determined, and had formed no intention as to what height they intended to construct the same, or intended to construct the same to a greater height than thirty feet: that in fact they did construct the same afterwards to a much greater height than thirty feet; by reason of which representation the said arbitrators awarded to the plaintiff much less money for such compensation as aforesaid than they would otherwise have done.

The defendants demurred to the eleventh count, and pleaded (*inter alia*) as follows:—

Eighth plea to seventh count.—That the defendants had not notice that any drain which was or had been interrupted was a drain for the drainage of the said adjoining lands of the plaintiff; nor that the plaintiff required any or what drain to be made and provided for the use and occupation of his said adjoining lands; nor did the plaintiff in fact require any such drain to be made and provided.

Tenth plea to eighth count.—That the defendants had not notice that the plaintiff required any or what way to be made and provided for the use and occupation of his said adjoining lands; nor did the plaintiff in fact require any such way to be made and provided.

Thirteenth plea to ninth count.—That the defendants did what is therein complained of under the authority of and in the execution of the powers conferred on and vested in them by the said Act.

Fifteenth plea to tenth count.—That the defendants did

what is therein complained of under the authority of and in the execution of the powers conferred on and vested in them by the said Act.

Twentieth plea to second, fourth, fifth, sixth, ninth, and tenth counts.—That before the passing of “The Bristol Waterworks Act, 1846,” and before the incorporation of the Bristol Waterworks Company, G. Sanders, J. Haberfield, G. Budd, &c., were the promoters of a bill for incorporating the said Company, and were the provisional committee of the said Company as provisionally registered ; and that an agreement by deed was made between the plaintiff of the one part, and the said G. Sanders, J. Haberfield, G. Budd, &c., on behalf of the said promoters and provisional committee, of the other part.—The plea then set out the agreement, whereby, after reciting that a bill was depending before parliament for supplying with water the city of Bristol, which bill had been read a second time in the House of Commons and ordered to be committed; and that the plaintiff was a landowner named in the book of reference for the said bill, and had determined to oppose the same in committee, but in consideration of the payments and stipulations thereafter mentioned he had agreed to withdraw such intended opposition and to assent to the said bill ; it was witnessed that the said G. Sanders, J. Haberfield, G. Budd, &c., for themselves and all others the provisional committee for carrying the objects of the said bill into effect, and for the said intended Company, had thereby agreed to and with the plaintiff in manner following—

First.—That in the event of the said bill passing and becoming a law, the Company intended to be thereby incorporated shall, within six months after the passing of the said bill, purchase the lands intended to be taken by the said Company for the works under the powers of the

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said act, &c., and pay for the same at and after the rate of 150*l.* per acre for the fee simple, &c.

Second.—That in addition to the said purchase money for the said lands, the said Company shall pay for any damage or injury which the said A. Blaggrave shall sustain by reason, or means, or in consequence of the water of the said Company being near to, or otherwise affecting the mansion house of the said A. Blaggrave, called, &c., or the farm house thereunto belonging, &c., or by reason, or means, or in consequence of the works of the said Company: the amount of such damage to be estimated in the manner hereinafter mentioned.

Third.—That the said Company shall also pay for all ornamental timber, or timber-like trees, or other trees whatsoever, which shall be upon the land so to be taken by the said Company as aforesaid; the same to be valued as hereinafter set forth.

The fourth clause provided for payment to the tenants of A. Blaggrave all such damage as they might sustain by reason of the Company's works.

Fifth.—That in addition to the several payments aforesaid, the said Company shall satisfy and make good to the said A. Blaggrave, or his tenants, all loss or damage which the erection of such intended works may cause to any property belonging to or in the occupation of him, them, or any of them which the said Company shall not purchase (save and except any damage which may be occasioned by severance or separation), and whether such loss or damage shall be caused by reason or means, or in consequence of the order of the said Company, or any of their authorized agents; or by reason, or means, or in consequence of the acts or neglects of the said Company, or any of their servants, agents, or workmen, without their authority.

(The sixth article was not material to the present questions.)

Seventh.—That the amount to be paid by the said Company to the said A. Blagrave, or his said tenants, in respect of the several items of claim hereinbefore respectively numbered or designated "second," "third," "fourth," and "fifth," shall be settled and determined in the manner hereinafter mentioned, that is to say,—

Eighth.—That in order to settle and adjust the sums or sum of money to be paid by the said Company to the said A. Blagrave, as satisfaction of the several items of claim hereinbefore respectively numbered or designated "second," "third," and "fifth," J. Sturge, of, &c., and J. Simpson, of, &c., and such third indifferent and competent person as they shall nominate in writing, indorsed on these presents, shall be arbitrators to assess and settle the sums or sum of money to be so paid to the said A. Blagrave, as and for satisfaction in respect of the said respective items of claim, &c.—(The clause then went on to provide for the making award. There were other articles not material to the present questions.)—The plea then averred, that the bill passed into a law by the name of "The Bristol Waterworks Act, 1846," and that the defendants were thereby incorporated; that they adopted the said agreement; that the plaintiff and defendants afterwards respectively did all acts which were necessary and proper for the having the said arbitration in the eighth article of the agreement mentioned, and for giving validity thereto; that such arbitration was duly had, and that the arbitrators appointed by or in pursuance of the said agreement, made a good and valid award, and thereby settled and adjusted the several sums of money to be paid by the defendants to the plaintiff, as satisfaction of the said several items of claims in the said agreement respectively numbered or designated "second," "third," and "fifth;" that the defendants purchased from the plaintiff the lands intended to be taken by them for their works under the

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powers of the said Act, as in the first article of the said agreement mentioned, and paid to the plaintiff, and the plaintiff then accepted, a certain sum of money for the same, being at and after the said rate of 150*l.* per acre, before entering upon or taking possession of the said land; and also, and before the committing of any of the supposed grievances alleged in the counts in the introductory part of this plea mentioned, paid to the plaintiff, and the plaintiff then accepted, the several sums of money so awarded as aforesaid, as satisfaction of the said several items of claim numbered "second," "third," and "fifth;" that the said arbitration was had, and the said sums of money respectively were paid by the defendants, and accepted by the plaintiff, in order to, and as being the performing and carrying out by them respectively, of the said recited agreement, and in full satisfaction and discharge of the price of the said land, and of all such claims and damages as in the first, second, third, and fifth articles of the said agreement respectively mentioned; and that the plaintiff thereby discharged the defendants from all further claims of him the plaintiff in respect of the same, and that the said supposed grievances alleged in the counts in the introductory part of this plea mentioned, were damages and injuries to which the said last mentioned items of claim apply, and which were included in the said damages so compensated, and that they were committed after the paying and accepting of the said several sums of money respectively.

Demurrer to eighth, tenth, thirteenth, fifteenth, and last plea.—Joinders therein.

Butt (Collier with him) argued for the defendants in Trinity Term (June 4).—First: the eleventh count discloses no cause of action. It is not alleged that the representation was made on oath, or before the arbitrators when

acting as such ; nor that the arbitrators did not give all that the plaintiff was entitled to. [Pollock, C. B.—That count is clearly bad.]—Then as to the seventh count and eighth plea ; that count, which is founded on the 49th section (a) of “ The Bristol Waterworks Act, 1846,” 9 & 10 Vict. c. ccxxii.), is bad, inasmuch as it does not allege that the Company had notice or knowledge of the existence of any drain, or of obstruction by their works. In the formation of such works, a deep drain might be affected without the Company being aware of it. They could not see the drain, and would have no means of knowing when it ceased to act. The matter is properly within the knowledge of the plaintiff, and therefore he was bound to give notice to the Company ; 2 Wms. Saund. 62, note 4 ; Com. Dig. Pleader (C 73); *Rez v. Holland*(b). The same reasons which shew that the count is bad, also shew that the tenth plea is good. But further, assuming that the plaintiff has sustained any damage by reason of the works of the Company, no *action* will lie. The obligation to substitute a drain is imposed by the statute ; and in case of non-compliance, the statute provides a remedy by arbitration under “ The Lands

(a) Section 49 enacts, “ That the company shall, and they are hereby required, in forming the several reservoirs and works hereby authorized to be made, and the several feeders, tunnels, and watercourses connected therewith or leading thereto, at their own expense to make and provide a sufficient number of convenient roads, ways, bridges, tunnels, culverts, and other means of communication, watering places, wells, watercourses, drains, and channels for irrigation for the use and occupation of the adjoining lands, and for irrigating the same in

those parts where the present roads, ways, means of communication, watering places, wells, watercourses, drains, and channels shall be taken away or interrupted, injured, or rendered inconvenient or useless by reason of the making of the said reservoirs and other works ; and in case of difference arising between the said company and the owners of the lands for the benefit whereof such works are undertaken, such difference shall be settled by arbitration.”

(b) 5 T. R. 621.

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Clauses Consolidation Act, 1845 (*a*). As a general rule where a statute creates an obligation, and provides a specific remedy for its non-performance, that remedy must be pursued; *Timms v. Williams* (*b*); *Stevens v. Jeacocke* (*c*); *Doe d. Murray v. Bridges* (*d*). The same objections apply to the eighth count and tenth plea.—Then, with respect to the demurrs to the ninth count and thirteenth plea, and to the tenth count and fifteenth plea, it is objected that the Company had no power to stop a public footway; the answer is, that they were empowered to make the reservoir, and if in so doing they for a time obstructed the footway, and it became necessary to do so for the purpose of making the reservoir, the inconvenience thereby caused to the plaintiff gave him no right of action. A private individual cannot maintain an action for stopping a public way, unless a personal and peculiar damage has resulted to him from the obstruction. These counts fail to shew any such damage; but even if they do, the remedy is by arbitration under "The Lands Clauses Consolidation Act, 1845."—The twentieth plea affords a good answer to the counts to which it is pleaded, viz. the second, fourth, fifth, sixth, ninth, and tenth. The injuries complained of in those counts being, as alleged (and admitted by the demurrer), within the second, third, and fifth clauses of the agreement, the

(*a*) Sect. 55. Provided always, and be it further enacted, "That all disputes which may arise respecting any compensation, rents, works, matter, or thing whatsoever done or performed, or to be paid, done, or performed, under the provisions of this Act, shall be determined by arbitration, and for such purpose all the provisions in the Lands Clauses Consolidation Act, 1845, for the settling of questions of disputed compen-

sation, shall apply to all questions which may arise respecting any compensation, rents, works, matters, or thing whatsoever done or performed, or to be paid, done, or performed, pursuant to or under the provisions of this Act, and to the arbitrator or arbitrators or umpire who may be appointed under the same."

(*b*) 3 Q. B. 413.

(*c*) 11 Q. B. 731.

(*d*) 1 B. & Adol. 859.

damage has been ascertained by arbitration, an award made, and the sum awarded paid and accepted in satisfaction; but if those clauses do not apply, then the remedy is by arbitration, as provided for by the Company's Act.

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*Montague Smith (Barstow with him), for the plaintiff.*—The eleventh count is good. It charges a false and fraudulent representation made by the defendants, as to the height to which they intended to construct the reservoir, by reason whereof the arbitrators awarded to the plaintiff less compensation than they otherwise would have done. [Pollock, C. B.—That is no ground of action: if the award was obtained by fraud, the plaintiff should have applied to the Court to set it aside.] An action is maintainable for a false and malicious representation, whereby special damage accrues: *Green v. Button (a)*.—The seventh count is good, and the eighth plea bad. By the 49th section, the Company are bound to make drains where the present drains are interrupted by reason of their works. Notice need not be alleged, because the fact is as much within their cognizance as the plaintiff's. They have only a conditional power to interrupt drains, that is, provided they make other drains. In Com. Dig. tit. "Pleader" (C. 75) it is said, "So, if he assumes &c. to pay on the performance of a certain act by the obligee himself, or on the performance of an act by him to any certain person; for he takes upon himself to take notice of it at his peril; as if a man assumes &c. to pay on the marriage of the obligee, &c. with B." [Pollock C. B.—We are all of opinion that the count is good and the plea bad.] The same considerations apply to the eighth count and the tenth plea. The only remedy for the wrongful act complained of in the seventh

(a) 2 C. M. & R. 707.

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and eighth counts is by action. The plaintiff does not seek to enforce the substituting a new drain; but he claims a compensation for damages sustained in consequence of the injury to his drain, and the statute gives no power to the arbitrators to award such compensation.—Then as to the ninth count and thirteenth plea, and the tenth count and fifteenth plea: those pleas are bad, for the Company have no power under the statute to stop a public highway or footway; *Smith v. Bell* (*a*). The only clauses which enable them to interfere with public ways are the 64th and 66th. But assuming that the Company have power to stop up public ways, these pleas are bad for not averring that they provided other ways in lieu thereof, or made satisfaction to the plaintiff for the injury sustained by him. The ninth and tenth counts disclose a sufficient personal and peculiar injury to the plaintiff to enable him to maintain the action; *Wilkes v. The Hungerford Market Company* (*b*), *Rose v. Groves* (*c*).—The twentieth plea is bad: the award is no bar to the subsequent vexatious acts charged in the second count; nor to the damage arising from the subsequent negligence charged in the fourth count; nor to the erection of a channel across a way as charged in the fifth count; nor to the stoppage of a public way, as alleged in the ninth count, which was no loss or damage to plaintiff's land, but resulted in special damage to himself: the plea, therefore, being bad as to part of the subject-matter to which it is pleaded, is bad altogether; *Gabriel v. Dresser* (*d*). [Bramwell, B.—Why may not the plea be construed distributively, as if pleaded to each count?] The seventy-fifth section of the Common Law Procedure Act, 1852, does not render

(*a*) 10 M. & W. 378.

(*b*) 2 Scott, 447; 2 Bing. N. C.

(*c*) 5 Man. & G. 613.

(*d*) 15 C. B. 622.

pleas distributable on demurrer, but only on the finding of the jury. [*Pollock, C. B.—Gabriel v. Dresser* is no authority for the proposition for which it is cited, and if it were, I should not agree with it.]

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Butt replied.

Cur. adv. vult.

The judgment of the Court was now delivered by—

ALDERSON, B.—We are of opinion that the eleventh count is bad. It was scarcely attempted to be supported on the argument, and we think that it discloses no cause of action.

As to the seventh count and the eighth plea, we are of opinion that the plaintiff is entitled to judgment. The count was objected to on the ground that it did not allege notice to the defendants. But the complaint is, that the defendants by their *own* works on their *own* land stopped a drain, draining the plaintiff's land, whereby the land was injured. It is not a proceeding to get a new drain, but compensation for the stopping of the old one. Then this act of the defendants is a matter more within their knowledge than that of the plaintiff, and it could not be necessary for him to give them notice not to do an act on their own land, to his prejudice on his. The count therefore is free from objection on that ground, and the eighth plea is bad.

But it was further objected that no action would lie for the act complained of, and that the remedy was under the statute by arbitration. But, as we have said, we understand the count as claiming a compensation for damages sustained, and not as seeking to enforce the substituting of a drain, and we find no provision in the statute for the recovery of

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such compensation except by action. This objection therefore also fails, and the seventh count is good.

Similar considerations dispose of the eighth count and tenth plea in the plaintiff's favour. Also the ninth count and thirteenth plea, except that to this count a further objection was taken, viz., that it did not appear that the plaintiff had sustained any particular damage, so as to give him a right of action. We think, however, that such damage is stated, and that this count is also good and the plea to it, demurred to, bad.

On the argument the defendants' counsel put the tenth count and fifteenth plea on the same footing as the ninth count and thirteenth plea, and so far as that is the case they should receive the same decision; but, on looking into the tenth count, we cannot find any cause of action stated. The complaint is that the defendants, by stopping up on their own land the continuation of a public footway over the plaintiff's land, caused persons to trespass on other parts of the plaintiff's land, to his damage; but this is no cause of action against the defendants, and we therefore think this count bad.

The remaining questions are on the twentieth plea; and the first is, which, if any, of the claims to which it is pleaded is within it. Now it is alleged in the plea that the claims in all the counts to which it is pleaded are claims provided for by the second, third, and fifth articles of the deed; and if this statement *can* be true in point of *law*, it must be taken on this demurrer to be so in point of *fact*. We think it can be true as to the second count, for the slackening the speed of the stream may be a loss caused by the erection of the defendants' works within the fifth article.

But it is alleged in the twentieth plea, that the acts complained of were committed after the paying and accepting

of the money, and it seems to us that it cannot be that the deed can apply to wrongful acts, not warranted by the statute or otherwise by agreement between the parties ; therefore the twentieth plea cannot be true as to the other counts to which it is pleaded.

This raises the last question, viz., whether the plea can be good in part and bad in part. It is supposed that *Gabriel v. Dresser* (a) had decided that, if bad, it was bad in toto. But we do not understand that case so to decide ; and think that the plea constitutes a good answer to the second, but not to the other counts, and that there must be judgment accordingly.

It was further said that all these counts shewed only causes of compensation, not of action ; of this we have already disposed. No mode can be pointed out to us by which the plaintiff could get such compensation.

Judgment accordingly.

(a) 15 C. B. 622.

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## IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

June 16.

## COBBETT v. WARNER.

The proviso in the 143rd section of the Turnpike Act, 3 Geo. 4, c. 126, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section: therefore, if a party seeking to recover penalties imposed by that act omits to give the requisite notice or to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether.

**E**RROr on the judgment of the Court of Exchequer for the defendant (*a*).—The first count of the declaration stated that the defendant was indebted to the plaintiff in the sum of 100*l*, being forfeited by an act passed in the third year of the reign of his Majesty King George the Fourth, intituled, “An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England.” (3 Geo. 4, c. 126).—There were similar counts claiming other penalties under the same act.

**P**leas.—First, that twenty-one days' notice of commencing this action was not given to the defendant before the same was commenced.

**S**econd.—That the several forfeitures in respect of which the said debts and sums of money in the declaration mentioned are respectively sought to be recovered were committed, and the said causes of action in the declaration mentioned, and each of them, accrued more than three months before the commencement of this action.

**D**emurrer to each plea.—**J**oinder therein (*b*).

The plaintiff appeared in person and argued: First, that the proviso in the 143rd section of the 3 Geo. 4, c. 126,

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| ( <i>a</i> ) The Court gave judgment on the authority of <i>Tousey v. White</i> , 5 B. & C. 125, without hearing any argument. | ( <i>b</i> ) Before <i>Coleridge, J., Wrightman, J., Cresswell, J., Erle, J., Williams, J., and Crowder, J.</i> |
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was not intended as a protection for offences; and that, according to its true grammatical construction, a plaintiff, who omitted to give notice, or did not commence his action within the prescribed period, was not thereby barred of his right of action, but only deprived of his right to costs. Secondly, that the 143rd section only applied to acts done by virtue of the statute, and not to penalties for acting in contravention of it.—He referred to *Towsey v. White* (*a*), and *Charlesworth v. Rudgard* (*b*).

*H. Lloyd* appeared for the defendant, but was not called upon to argue.

*COLERIDGE, J.*—The judgment of the Court below must be affirmed. The plaintiff relied on the case of *Charlesworth v. Rudgard* as opposed to *Towsey v. White*; but both cases are well decided, and *Towsey v. White* governs the present case. Indeed, if *Towsey v. White* had not been decided, I should have come to the same conclusion. The question turns on the language of the 143rd section of the 3 Geo. 4, c. 126, which prescribes the mode in which penalties given by the act are to be recovered. There is a division between penalties above 20*l.* and upwards, and penalties not exceeding 20*l.* and more than 5*l.* This is an action for a penalty exceeding 20*l.*, and therefore it comes within the first branch, which says that, if the penalty "shall exceed 20*l.* or upwards, it shall be recoverable by action of debt in any of his Majesty's Courts of Record;" and after giving a form of declaration, it says: "and the plaintiff, if he recover in any such action, shall have full costs." Then comes the proviso, and I am clearly of opinion, with *Bayley, J.*, and *Holroyd, J.*, in *Towsey v. White*, that it

(*a*) 5 B. & C. 125.

(*b*) 1 C. M. & R. 498.

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extends to all penalties exceeding 20*l.*; that there can be no more than one recovery for the same offence; that twenty-one days' notice must be given before commencing the action, and that it must be commenced within three calendar months after the offence has been committed. We cannot make sense of the proviso, if it be read as confined to the provision respecting costs: it says, "that there shall not be more than one recovery for the same offence." What can that have to do with the provision as to full costs? So, with regard to twenty-one days' notice of action, and the limitation of three months, why should the recovery of full costs depend on those circumstances? It is clear that they relate to the informer having the benefit of bringing an action for the recovery of the penalties; and with that short form of declaration; and he is to earn that right by these conditions,—that there shall not be more than one recovery for the same offence, that twenty-one days' notice be given before the commencement of the action, and that the same be commenced within three calendar months after the offence.

WIGHTMAN, J.—*Towsey v. White* is an express authority in point; and with that decision I entirely concur. Moreover, if there had been no decision on the subject, upon the terms of the section I should have come to the same conclusion.

Judgment affirmed.

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## MEMORANDA.

In the present Vacation (Nov. 1), the Right Honourable Sir *John Jervis*, Knight, Lord Chief Justice of the Court of Common Pleas, died. He was succeeded by Sir *Alexander James Edmund Cockburn*, Knight, her Majesty's Attorney General, who was first called to the decree of the coif, and gave rings with the motto "Fiat Justitia."

In the same Vacation, the Honourable Sir *Thomas Joshua Platt*, Knight, resigned the office of Baron of the Court of Exchequer, in consequence of continued indisposition. He was succeeded by *William Henry Watson*, Esq., one of her Majesty's Counsel, who was first called to the decree of the coif, and gave rings with the motto "Militavi." He afterwards received the honour of Knighthood.

Sir *Richard Bethell*, Knight, her Majesty's Solicitor General, was appointed to the office of Attorney General; and the Right Honourable *James Stuart Wortley*, one of her Majesty's Counsel and Recorder of the City of London, was appointed to the office of Solicitor General.

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# Exchequer Reports.

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{ Nov. 3.

PARDINGTON v. THE SOUTH WALES RAILWAY COMPANY.

A person sending cattle by railway signed a contract containing the following amongst other conditions: "A pass for a drover to ride with his stock will be given. The Company is to be held free from all risk in respect of any damage arising in the loading, or unloading, from suffocation, or from being

trampled upon, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever." A drover received a pass to go with the cattle. The cattle were not put into proper cattle trucks, but into vans closing with lids, ordinarily used for the conveyance of salt, the drover not objecting. The lid of one of the vans having become closed in the course of the journey several of the cattle were suffocated, the drover being at the time in another carriage.

*Held*, that the conditions were reasonable, and that the Company were not responsible.

*Sensible*, per *Martin*, B., and *Bramwell*, B., that notwithstanding 17 & 18 Vict. c. 31, s. 7, special contracts with Railway Companies are binding, whether the conditions contained in them are reasonable or not.

Pleas.—First, not guilty. Second, that the plaintiff did not deliver to the defendants the said cattle to be safely carried, &c. Thirdly, that the cattle were delivered to and received by the defendants to be carried from Newport to Gloucester under a special contract signed by the person who delivered the said cattle to the defendants for carriage, and subject to certain just and reasonable conditions (setting them out), of which the plaintiff, at the time he delivered the said cattle to the defendants to be carried, &c., had notice, and then assented to the same being carried subject to the contract and conditions, and on no other terms whatsoever. And that the suffocation &c. was not occasioned by the neglect or default of the defendants or their servants.

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Replications taking issue on pleas.

At the trial, before *Alderson*, B., at the last assizes for Gloucester, it appeared that, on the 11th of March, Thomas Morgan, a cattle dealer, wishing to send thirty-three head of cattle, the property of the plaintiff, from Newport to Gloucester, wrote to the superintendent of the Newport station, requesting him to have two or three cattle trucks ready for the following day. When he brought the cattle to the station, the superintendent shewed him the carriages in which the cattle were to go, which were vans closing with lids, generally used for the conveyance of salt. He made no objection to the vans, and the cattle were placed in them to be forwarded to Gloucester. The lids were open when the train left Newport.

He signed a contract, the material parts of which are as follows:—

“South Wales Railway.

“Cattle receiving note.                      Goods department.

“Cattle, sheep, &c. will be conveyed on this railway at the rate of 6d. per truck per mile, for all distances above twenty miles,” &c.

“A pass for a drover to ride with his stock will be

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given for every 10 beasts, 30 calves, 75 pigs, or 100 sheep.

"All carriage must be pre-paid, &c. And the stock will only be conveyed on the following conditions: The Company is to be held free from all risk or responsibility in respect of any loss or damage arising on the loading, or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever. The Company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market."

"The form below is to be filled up, and signed by the party desiring to send cattle," "and unless this and the following rules be complied with, the cattle will not go forward."

*March 12, 1856.*

To Messrs. The South Wales Railway Company.

In conformity to the above regulations with regard to the conveyance of cattle and live stock, I request that two trucks may be ready at the Newport station, in which I may load 33 cattle to be conveyed from Newport station to Gloucester, on the conditions above mentioned.

£2. 5s. Od.

(Signed) THOMAS MORGAN, Sender. Paid."

The plaintiff's servant in charge of the cattle received a free pass from the Company. He travelled in the same carriage with the guard, and did not get out to look at the cattle during the journey, but on arriving at Gloucester he heard them making a noise, and found that the lid of one of the vans had become closed, and that of sixteen oxen in it, ten were dead, or dying from suffocation, and four very much injured. Some evidence was given to shew that the lid could not have become closed by the motion of the train, but must have been purposely shut down by the

servants of the railway Company. The learned Judge asked the jury whether they thought that the cattle were suffocated during the transit; and the jury, having found that question in the affirmative, he directed a verdict to be entered for the defendants, giving leave to the plaintiff to move to enter a verdict for 135*l.*, if the Court should be of opinion that the conditions were unreasonable.

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*Keating* now moved in pursuance of such leave.—By the 17 & 18 Vict. c. 31, s. 7, it is provided, “that every railway Company shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such Company, or its servants, notwithstanding any notice, &c. contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, &c., as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable.” In the present case, the Company were guilty of direct negligence; though they had sufficient notice, and might have provided proper cattle trucks, they put the cattle into vans in which they were exposed to unnecessary risk. The plaintiff’s servant could not have safely ridden in these vans with the cattle. Drovers are not sufficient judges of the propriety and safety of railway arrangements for the carriage of cattle. Surely a notice which protects the Company against an injury caused entirely by their own negligence, in putting cattle into carriages unfitted for them, is not reasonable.—He referred to *Wise v. The Great Western Railway Com-*

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pany (a). [Martin, B.—It is doubtful whether the common law as to the liability of carriers, applied to the carriage of cattle (b).]

POLLOCK, C. B.—I am of opinion that the ruling of my brother *Alderson* was correct, and that it is quite reasonable for the Company to make such stipulations as those contained in the special contract in the present case. The Company provided free passes for the drovers to enable them to go with the cattle for the express purpose of taking care of them. The drover had the means of knowing whether the cattle could travel safely in the carriages provided for them, and he had no right to acquiesce in what was done and then throw the responsibility of failure upon the Company.

MARTIN, B.—I am of the same opinion. I am well aware that the case put by Mr. *Keating* seems hard, that where there has been negligence a person injured by it should not recover. But it is necessary to companies that they should have power to make reasonable provisions for their own protection; and it seems to me especially reasonable that when animals are sent by railway such provisions should be made. If any servant of the Company had done the act which caused this mischief he would have been responsible. Here, however, it was apparently a mere accident. Besides there was a written contract for the conveyance of these cattle duly signed as provided by the Act: people who make such contracts are bound by them.

BRAMWELL, B.—I am of the same opinion. I think that the question of reasonableness does not arise: and that the

(a) *Anté*, p. 63.

(b) See per *Parke, B., Carr v. Lancashire and Yorkshire Railway*

Company, 7 Exch. 711. Chitty and

Temple on the Law of Carriers, p. 70.

meaning of the Act is that companies shall be liable for injuries to any cattle occasioned by the neglect or default of the Company or its servants, notwithstanding any notice, condition, or declaration limiting such liability, but that in each case particular bargains may be made. It has been suggested that a railway Company might have made any conditions with respect to the carriage of cattle, because they are not compelled to carry them. Assuming that the question of reasonableness does arise, the stipulations in the present case appear to me reasonable. The Company say that they do not choose to be liable for accidents occasioned by the negligence of persons who have the care of cattle, and as in the nature of things such accidents are likely to occur, they will not undertake the risk, but allow the owner's servants to travel free in charge of the cattle. If the sender is dissatisfied, he should object, or pay something additional for the extra risk.

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ALDERSON, B.—I thought at the trial that the provision was reasonable, because the Company permitted the drovers to go with the cattle to take care of them. The plaintiff's servants looked at the vans and knew of the lids, but never troubled themselves to look after the cattle on the journey. The negligence immediately conducive to the injury was on the part of the plaintiff's own servants.

Rule refused (*a*).

(*a*) See *Chippendale v. Lancashire and Yorkshire Railway Company*, 21 L. J. Q. B. 22.

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Nov. 3.

**HILL and Another v. THE LONDON AND COUNTY ASSURANCE
COMPANY.**

Under 7 & 8 Vict. c. 110, s. 66, a judgment creditor, having failed to obtain satisfaction by execution against the effects of a Company completely registered under that Act, may proceed at once against a person who was a shareholder at the date of the contract on which the judgment is founded, but who has ceased to be a shareholder, without proceeding against the existing shareholders in the first instance.

An order for the winding-up of the Company, where no official manager has been appointed, has no effect upon the right of such creditor to issue execution against the shareholders.

JUDGMENT had been signed by the plaintiff against the defendants, who were a company completely registered under the 7 & 8 Vict. c. 110, and not incorporated by act of parliament or charter, or having the liabilities of its members restricted by virtue of any letters patent. A writ of fi. fa. had issued, directed to the sheriffs of London, under which certain goods had been seized at the office of the Company, but these goods having been claimed by a person who held a bill of sale of them, the sheriff was unable to levy the debt, and the writ was returned nulla bona. The plaintiff Hill, swore that having made inquiries of the secretary and other people, he believed that the Company had no property whatever whereon a levy could be made, and that the only chance of obtaining satisfaction of the claim was by proceeding against the individual shareholders. Jessopp was a director, and had executed the deed of settlement as a shareholder for 500 shares. He continued to be a shareholder at the time when the contracts were made with the plaintiff, on which the action was brought, but ceased to be so by transferring his shares on the 18th of March last. He stated that he had paid up all calls on his shares, that the Company was largely indebted to him, and that there was due from other shareholders, who were, as he believed, solvent, a considerable sum for unpaid calls. It was suggested that the Company were in possession of a written agreement for a lease of their place of business. On the 1st of November last, an order for the winding up of the Company, under the provisions of the Joint Stock Companies Winding-up Acts, 1848, and

1849 had been made, and an application was about to be made for an order appointing an official manager.

Upon these facts, *Martin*, B., had ordered, that the plaintiffs should be at liberty to issue execution against Jessopp.

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Prentice moved for a rule to shew cause why this order should not be set aside.—Execution ought not to issue against the former shareholders until attempts have been made to get satisfaction from the present shareholders of the Company. The 66th sect. of 7 & 8 Vict. c. 110, provides that execution may be issued “not only against the property and effects of the Company, but also, if due diligence shall have been used to obtain satisfaction of such judgment by execution against the property and effects of such company, then against the person, property, and effects of any shareholder for the time being, or any former shareholder of such Company, in his natural or individual capacity, until such judgment shall be fully satisfied, provided, in the case of execution against any former shareholder, that such shareholder was a shareholder of such company at the time when the contract or engagement for which such judgment may have been obtained was entered into,” &c. Under the 7 Geo. 4, c. 46, s. 13, execution must issue in the first instance against the members for the time being of banking copartnerships. The present Act may be similarly construed. In *Thompson v. The Universal Salvage Company* (a), *Alderson*, B., said: “A creditor has a right to have his debt satisfied by any person who either is a shareholder for the time being, or who at a former time has been a shareholder, but then he is bound to exhaust the one class before he resorts to the other.” The application being to the discretion of the

(a) 3 Exch. 310. See p. 315.

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Court, the plaintiffs should satisfy the Court that they have no reasonable probability of getting their debt from the present shareholders in the Company, before they resort to a remedy against persons who are out of the undertaking.—Secondly: the plaintiffs have not used due diligence to obtain satisfaction of the debt due to them from the Company. *Thompson v. The Universal Salvage Company* (*a*) decided that where the affairs of a company are being wound up under 11 & 12 Vict. c. 45, the creditor must prove his claim before the Master before he can issue execution against a shareholder. The affidavits here shew that the Company have assets; an agreement for a lease will be available in the hands of the official manager. The application is one to the discretion of the Court (*b*). [Martin, B.—My impression is, that it is a right.]

C. E. Pollock appeared to shew cause in the first instance, but was not called on.

POLLOCK, C. B.—There is no ground for rescinding the order. It is said that the plaintiffs must first make an effort to obtain payment from the existing shareholders of the Company, but the 7 & 8 Vict. c. 110, s. 66, puts former shareholders, who were shareholders at the time of the contract on which the judgment has been obtained, on the same footing as existing shareholders. Here the party sought to be charged was a shareholder at the time of the contract, and therefore upon ordinary principles he continues liable. He has ceased to be a shareholder, but that is no ground of exemption. With respect to the Winding-up Act, it does not apply in any way to stay execution.

(*a*) 3 Exch. 310.

Shannon Railway Company, 4 E.

(*b*) See *Mackenzie v. Sligo and* & B. 119.

At present, the plaintiffs have no means of proceeding under that Act to obtain satisfaction, no official manager having been appointed. I think, therefore, that we ought not to grant a rule.

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ALDERSON, B.—I am of the same opinion. A judgment creditor is entitled to issue execution, first, against the assets of the Company, and if he cannot succeed in obtaining satisfaction of his judgment by that means, then against the existing shareholders, or such others as were shareholders at the date of the contract. Jessopp was a shareholder at the date of the contract. As to the other point, it will be time enough to decide that when an official manager has been appointed, before whom the plaintiffs can prove their debts (*a*).

MARTIN, B.—At the time of the decision in *Thompson v. The Universal Salvage Company*, it was supposed that the Winding-up Act was intended to interfere with creditors. But on further consideration Courts of equity have decided that the statute has not that effect. The real object was to compel the shareholders to contribute and pay equally according to their interests. It does not affect creditors, but leaves them free to pursue their common law remedies. But as it is desirable that the official manager should know what the debts are, parties are compelled to go before the Master and prove their debts: the Courts of common law stay the proceedings till that is done, but, subject to that, the creditor is free, and can proceed to enforce his judgment in any way he pleases. By the 7 & 8 Vict. c. 110, these companies are constituted quasi corporations, so that a creditor

(*a*) On this point *Brettell v. Daxes*, 7 Exch. 307, was referred to on the argument.

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must look for the fruits of his judgment, first, to the effects of the corporation, but when that has been done the shareholders are liable as partners. It is a great misfortune that it has ever been supposed that shareholders are in a different position from ordinary partners.

BRAMWELL, B., concurred.

Rule refused (a.)

(a) See 11 & 12 Vict. c. 45, s. 58; *Aitchison v. Lee*, V. C. Kinsley, Nov. 5, 1856; *Morriss v. The Royal British Bank*, 1 C. B., (N. S.) 65; *In the Matter of the India and Australia Steam*



Nov. 7.

#### SAUNDERS v. BATE.

**Libel.** The declaration stated that the defendant wrote and published of the plaintiff that "a receipt was obtained from the defendant by fraudulent means, and that the plaintiff was cognizant of such fraud." The Judge at the trial allowed the declaration to be amended by introducing the letter, alleged to contain the libel, with the words "meaning thereby" immediately before the libel charged in the declaration.

*Held*, that the amendment was properly made.

**CASE for libel.**—The declaration stated, that whereas before the writing, &c., one H. had insured his life by a certain policy of assurance, made by a certain assurance society, subject to the payment of an annual premium, of which society the defendant was agent, for the purpose of receiving money paid for premiums and giving receipts; that H. had assigned the policy to the plaintiff, and covenanted to pay the premiums; that H. had obtained from the defendant a receipt for a premium signed by the defendant as agent, &c., and delivered the same to the plaintiff as evidence of the payment of the premium; and that the defendant, contriving &c. maliciously to injure the plaintiff, and to induce the

society to refuse to admit the payment of the premium, wrote in a letter to A. R. Irvine, the managing director, &c., a false, scandalous, and malicious libel, containing the false, scandalous, malicious, and libellous matter following, concerning the plaintiff, and concerning the obtaining of the receipt, that is to say: That the renewal receipt for the premium on H.'s life, being the said premium hereinbefore mentioned, was obtained from the defendant, so being the agent of such assurance society, by fraudulent means, and that the plaintiff was cognizant of such fraud.

At the trial before *Wightman*, J., at the last assizes for Worcester, Irvine, in obedience to a subpoena, produced a letter, which contained the following passage: "I am informed, that as the receipt was obtained from me by fraudulent means, it should be treated as a nullity, by giving notice, to the parties holding the policy, of the facts. I hope you will, upon taking the advice of your solicitor, give Saunders notice accordingly. There has evidently been preconcerted collusion between H. and Saunders throughout, as the latter is now holding all, or nearly all, of the public offices held by H., as well as having taken possession of his private papers, and entered upon the conduct of his private business. It is throughout a scandalous job, to defraud creditors whose claims are reported to amount to over 12,000*l.*" It was objected on behalf of the defendant, that this being an action of libel, the declaration should have set forth accurately the very words of the libel. The plaintiff's counsel applied for leave to amend, by setting out the letter in the declaration verbatim, with the words "meaning thereby" immediately before the libel charged in the declaration. The learned Judge permitted the amendment to be made; and offered to postpone the trial to enable the defendant to justify, if he thought he could do

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so ; the defendant's counsel refused to avail himself of this offer, and the jury found a verdict for the plaintiff.

*Whateley* now moved (*a*) for a new trial, on the ground that the amendment ought not to have been allowed. In actions for libel it has always been held necessary, that the declaration should state the very words of the libel (*b*). The defendant went to trial, relying on the variance. [*Martin*, B.—The 222nd section of the Common Law Procedure Act, 1852, directs, “that all such amendments shall be made as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties.” The real question between the parties here was, whether the defendant wrote a letter containing the libellous charge in the declaration. *Bramwell*, B.—The jury have found that the letter and the libel set out in the declaration were the same thing.]

**POLLOCK**, C. B., now said.—We are of opinion that the amendment was properly made, and therefore there will be no rule.

**MARTIN**, B.—Probably no amendment was necessary.  
 Rule refused.

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| ( <i>a</i> ) November 3.                        | 169; <i>Wright v. Clements</i> , 3 B. & |
| ( <i>b</i> ) See <i>Reg. v. Drake</i> , 2 Salk. | Ald. 503; <i>Cook v. Cox</i> , 3 M. &   |
| 660; <i>Wood v. Brown</i> , 6 Taunt.            | Sel. 110.                               |

1856.  
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## NIXON v. BROWNLOW.

Nov. 17.

**S**CIRE facias under 8 & 9 Vict. c. 16, s. 36. Whereas the plaintiff, by the judgment of this Court, recovered against the Kilkenny and Great Southern and Western Railway Company the sum of 508*l.* 8*s.*, a large part whereof, and interest, &c., to wit, 197*l.* 14*s.* 6*d.*, remains unpaid; and whereas on the 5th of May, 1855, an execution was issued upon the judgment against the effects of the Company, that is to say, a fi. fa. directed to the sheriffs of London, whereby, &c.; and whereas there could not be, and was not found, sufficient whereon to levy such execution, or any part thereof, and the said sheriffs have returned to our said Court, that the Company had not any goods or chattels in their bailiwick; and whereas you J. Brownlow, at the time of the judgment, and of the issuing of the said execution, and thence until and at the time of the notice and the motion in open Court, &c., and thence hitherto were and are a shareholder, &c., of fifty shares, &c., and a large amount of the said shares at the time of the judgment and execution, was, &c., and still is not paid up, to wit, 925*l.*; and whereas upon motion made in open Court, upon sufficient notice in writing to you, &c., our said Court ordered that C. Nixon might proceed against you as a shareholder, &c. Now, therefore, we command you, &c., to appear, &c., to shew cause why C. Nixon should not have execution against you of the amount of his judgment and interest unsatisfied, to the extent of and not exceeding the amount of the said shares in the capital of the Company not paid up, to wit, &c.

In a declaration in scire facias against a shareholder in a Company, under 8 & 9 Vict. c. 16, s. 36, it is sufficient to state that a writ of fi. fa. against the Company had issued, directed to the sheriff of one county, and that no goods of the Company were found in his bailiwick.

Under that section separate executions may issue against different shareholders till the debt is satisfied.

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Plea.—That after the issuing the said execution, and before the notice and motion in the declaration mentioned, six several writs of scire facias had, at the suit of the said plaintiff, and with the authority and consent of this Court, been respectively issued upon the said judgment against (six persons named), who were and still are respectively shareholders of and in the said Company, and were, and still are, liable to be sued upon the said judgment; and which said several suits of scire facias are still pending, and under which the said plaintiff could and ought to have raised the said sum of money so due and owing upon the said judgment.

Demurrer and joinder therein.

*Unthank*, in support of the demurrer.—The plea is bad; it should have stated that the plaintiff was satisfied. On the contrary, it does not appear that the writs have been served, or that a levy could have been made before the sci. fa. in the present case, or that the plaintiff knew that he could have obtained satisfaction, or that he failed to obtain satisfaction by reason of any fault of his own. It is clear that section 36 contemplates the issue of several writs of scire facias. The point has been decided under stat. 7 Geo. 4, c. 46, s. 13; *Burnester v. Cropton* (a); *Nunn v. Lomer* (b).

*J. G. Malcolm*, for the defendant.—The declaration is insufficient. The Company may have had funds elsewhere than in the city of London. This is a corporation whose principal place of business is in Ireland; and it is not sufficient to say, that there are no funds within the bailiwick of the sheriffs of London. It amounts to no more than that the corporation had no funds in a particular place. If a writ of fi. fa. against the Governor and Company of the

(a) 3 Exch. 397.

(b) 3 Exch. 471.

Bank of England were to issue to the sheriff of Surrey, it would probably be returned nulla bona. Surely that would not warrant the issuing a scire facias against the proprietors of Bank stock. [*Pollock*, C. B.—The 36th section does not justify that argument. It would be absurd to contend, that an execution must issue into every county. The writ of scire facias can only be issued by the order of the Court.]

Then, as to the plea, the 36th section does not provide for the issuing of concurrent writs of scire facias. It was never intended that a plaintiff should issue separate executions against all the shareholders. [*Pollock*, C. B.—The Court will consider the case against each shareholder separately.]

**POLLOCK, C. B.**—We are all of opinion that this plea is bad; and that there must be judgment for the plaintiff. The plaintiff has a right to get from each shareholder, not the amount of the debt, but so much as such shareholder ought to pay to the Company.

**ALDERSON, B.**—The defendant is only liable to the extent of his shares. Each shareholder might raise the same defence which the defendant does. If that could be done, no one would have to pay.

**WATSON, B.**, concurred.

Judgment for defendant.

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## Nov. 19. HAMLIN v. THE GREAT NORTHERN RAILWAY COMPANY.

A tradesman took a ticket to go by railway from London to Hull. On arriving at Grimsby he found no train ready to take him to Hull the same night, as it should have been according to the published time-bill. He slept at Grimsby, and in the morning paid 1s. 4d. fare to Hull. In consequence of the delay, he failed to keep appointments with his customers, and was detained for many days.

*Held,* that though he would have been entitled to have performed the contract at the expense of the Railway Company, yet, not having done so, that he was not entitled to recover anything more than nominal damages in addition to the 1s. 4d., and perhaps the cost of his bed &c. at Grimsby.

THE declaration stated that the defendants were the owners of a railway and of carriages for the conveyance of passengers; that the plaintiff was received by the defendants as a passenger to be carried from London to Hull by a train which the defendants advertised and represented to the plaintiff, by a published train bill, to be a train arriving at Hull at nine hours and thirty minutes in the afternoon, and that by reason of the negligence and default of the defendants the train did not arrive at Hull at that time or within a reasonable time afterwards, whereby the plaintiff was unable to carry on his necessary affairs and business as a tailor, and was deprived of the profits which otherwise would have accrued to him by reason of his business, and was put to great trouble, inconvenience, and expense by reason of the delay.

The defendant pleaded several pleas upon which issues were joined.

At the trial before *Martin*, B., at the Middlesex sittings in the present term, it appeared that the plaintiff was a master tailor going to Yorkshire to see his customers, having previously made arrangements to meet them at particular times and places. On the 25th of October, 1855, he took a ticket for Hull by the two o'clock train from King's Cross, which was advertised to arrive at Hull at half-past nine o'clock. On reaching Great Grimsby he found that there was no train to take him on to Hull. It appeared that the ferry boats from New Holland to Hull only run in connection with the trains. The plaintiff

stated that there was no possibility of his getting to Hull that night, and that he therefore remained at Great Grimsby, and paid 2s. for his bed and some refreshment. In the morning he presented his ticket for Hull, but the Company refused to recognise it, and he paid 1s. 4d. as the fare from Great Grimsby to Hull. He arrived at Hull at half-past eight o'clock on Friday, the 26th, and being too late for the seven o'clock train from Hull to Driffield, was unable to keep his appointments at Driffield and other places, which were generally on the market days. He stated that he incurred considerable expense, and lost much time, in going to the houses of his customers, having been eight days longer on his journey than he would have been if he had been able to have kept his appointments.

The learned Judge directed the jury that the defendants had broken the contract, and that the plaintiff was entitled to recover for the direct consequences of that breach of contract; that he would have been entitled to charge the Company with the expenses of getting to Hull, but that he had no right to cast upon the Company the remote consequences of remaining the night at Grimsby; that, not having communicated to the Company his intention of proceeding from Hull to Driffield, he could not recover damages for having been prevented from doing so; that he was entitled to the fare paid from Great Grimsby, and perhaps the 2s. for his bed and refreshment. He ruled that the damages ought not to exceed 5s. Verdict for the plaintiff, with 5s. damages.

*Wilde* moved (Nov. 10) for a new trial on the ground of misdirection. According to the rule laid down in *Hadley v. Baxendale* (a), it must be admitted that the plaintiff, not

(a) 9 Exch. 341.

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HAMLIN
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NORTHERN
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having communicated to the defendants the special injury likely to result from the breach of contract, cannot charge them with the specific damage he incurred. But he is entitled to some damages (a), and, as a matter of law, the Judge could not tell the jury that they could give no substantial damages beyond 5s. The damages are in the hands of the jury, with certain limited exceptions. It is said that there is a distinction between actions of tort and actions founded upon contract, and that, with the exception of the case of a contract to marry, in actions for breaches of contract the inconvenience or injury to the feelings of the plaintiff cannot be taken into consideration in assessing the damage. But the reason why the contract to marry is said to be an exception is that it is a contract affecting the person. The contract, the breach of which is complained of here, is of a similar character. In a case recently tried before *Martin*, B., the plaintiff had been a passenger on board an emigrant ship, and complained of not having been supplied with sugar during the voyage, and it was held that he was entitled to recover substantial damages. [*Martin*, B.—That was a different case. Here the plaintiff could have got to Hull in time if he had chosen to do so.]—He referred to the distinction made in the code of Louisiana, art. 1928-3, cited Sedgwick on Damages, 209,—between actions for the breach of ordinary contracts and such as have for their object some intellectual enjoyment or other legal gratification not appreciable in money.

Cur. adv. vult.

POLLOCK, C. B., now said.—We are all of opinion that the rule must be refused. The action is brought to recover damages for a breach of contract. A contract to marry has

(a) He referred to *Wood v. Bell*, 5 E. & B. 772. See *Fletcher v. Tayleur*, 17 C. B. 21.

always been considered an exceptional case, in which the injury to the feelings of the party may be taken into consideration. So in the case of wrongs not founded on contract, the damages are entirely a question for the jury, who may consider the injury to the feelings, and many other matters which have no place in questions of contract. In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated. Mr. *Wilde* was invited at the trial to state what were the damages to which the plaintiff was entitled. He said, general damages. The plaintiff is entitled to nominal damages, at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.

Rule refused (a).

(a) Compare Code Civil, 1144, 1150, 1151, and notes, ib. ; Codes Annotés, Teulet, D'Auvilliers, et Sulpicy ; Cod.vII. Tit. 47, *De Sen-* *tentiis quæ pro eo quod interest* ; and see *Denton v. The Great Northern Railway Company*, 5 E. & B. 860.

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HAMLIN  
v.  
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NORTHERN  
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Nov. 20.      KEARNEY v. THE WEST GRANADA GOLD AND SILVER  
MINING COMPANY.

By agreement under seal, the defendants agreed to pay the plaintiff a sum of money by instalments, and the plaintiff agreed to deliver up to the defendants certain bills of exchange mentioned in a schedule: provided that if the plaintiff should not, before the last instalment became due, deliver to the defendants "the bills" mentioned, the payment should be postponed until their delivery. The bills were foreign bills drawn on the defendants in sets of three.

*Held,* that the plaintiff did not perform his contract by delivering to the defendants one part of each of the bills so drawn.

THE declaration stated, that by articles of agreement made the 15th December, 1854, between the plaintiff of the one part and the defendants of the other part, and sealed with their respective seals, (after reciting as therein is recited) the defendants did, amongst other things, agree that they should pay to the plaintiff the sum of 375*l.*, making, together with 500*l.* which they had already paid him, as he did by the said articles of agreement thereby acknowledge, the sum of 875*l.*, by four instalments of 93*l.* 15*s.*, and that the first of such instalments should be payable one calendar month after the plaintiff should have delivered up to the defendants certain bills of exchange in the first schedule thereunder written, and that the remaining three instalments should be payable respectively at one, two, and three months thereafter; that it was provided by the said articles of agreement that if, at those respective times, the plaintiff should not have delivered up to the company further bills of exchange mentioned in the said first schedule to the amounts next hereinafter mentioned, that is to say, before the second instalment should become due the sum of 200*l.*; before the third instalment should become due 200*l.* more; and before the fourth, or last instalment, all the bills mentioned in the said first mentioned schedule, the payment of such instalments respectively should be postponed until such deliveries respectively should have been duly made. And the plaintiff by the said articles of agreement did agree to deliver up to the company the several bills of exchange mentioned in the said first mentioned schedule,

procuring, at his own expense, from the holders, such of the said last mentioned bills as were not in his own possession.

Breach.—That although the defendants have duly paid the plaintiff the first three of the said instalments of 93*l.* 15*s.*, and although the plaintiff hath done all things necessary to entitle him to have the last instalment of 93*l.* 15*s.* paid to him by the defendants, and all necessary times and things, &c., having elapsed and happened, yet the defendants have not paid the last instalment of 93*l.* 15*s.*

Pleas (*inter alia*).—Secondly: That the plaintiff had not, at the time appointed for the payment of the said fourth instalment, or at any time before the commencement of this suit, delivered up to the defendants all the bills in the declaration in that behalf mentioned.

Thirdly: That the plaintiff did not at his own expense procure from the holders such of the bills in the declaration mentioned, in that behalf mentioned, as were not in his own possession.

Replication.—The plaintiff takes and joins issue on the defendants' pleas.

At the trial before *Pollock*, C. B., at the last Surrey Assizes, the following facts appeared.—The plaintiff, who was a merchant at Colon, in the Isthmus of Panama, had brought an action against the defendants to recover a claim of 1777*l.* 11*s.* 8*d.* The case came on for trial, when a verdict was entered for the plaintiff for 2000*l.*, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred. The arbitrator made his award, and afterwards the parties entered into the agreement mentioned in the declaration. This agreement, after reciting the action and reference, and that the "parties had mutually agreed to settle, adjust, and determine all matters in difference between them upon the terms therein mentioned," contained

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(amongst others not material to the present question), the following stipulations:—

First.—The parties mutually agree that the award of the arbitrator shall be set aside. Each of the parties hereby releases to the other of them all sums of money, rights, claims, and demands whatsoever, under or by virtue of the said award: and covenants to indemnify the other of them against all claims whatsoever by any person or persons whomsoever under any of the provisions thereof.

Secondly.—The said J. Kearney (the plaintiff) hereby releases to the said Company the said claim of 1777*l.* 11*s.* 8*d.*, the said sum of 2000*l.* secured by the said verdict, and all other claims whatsoever (except under the provisions of these presents).

Fourthly.—The Company shall pay to the said J. Kearney the sum of 375*l.*, making together with 500*l.* (which they have already paid him), the sum of 875*l.*; such sum of 375*l.* shall be paid to the said J. Kearney by four instalments of 93*l.* 15*s.*, the first of such instalments shall be payable one calendar month after the said J. Kearney shall have delivered up to the Company bills of exchange mentioned in the first schedule, to the amount of 550*l.*, and three instalments respectively, at one, two, and three calendar months thereafter: Provided always, that if at those respective times the said J. Kearney shall not have delivered up to the Company further bills of exchange mentioned in the first schedule, to the amounts next herein-after mentioned, that is to say, before the second instalment becomes due, 200*l.*; before the third instalment becomes due, 200*l.* more, and before the fourth or last instalment, all the bills mentioned in the first schedule, the payment of such instalments respectively shall be postponed until such deliveries respectively shall have been duly made.

Fifthly.—The said J. Kearney shall deliver up to the

Company, the several bills of exchange mentioned in the first schedule hereunder written, procuring at his own expense from the holders such of the said bills as are not in his possession.

Ninthly.—The said J. Kearney agrees to indemnify the said Company, their agents and servants, against all claims and liabilities whatsoever, by reason of the non-payment of any of the said bills in the said first schedule, or by any person or persons, in respect of the consideration for which the said bills were given.

Before the last instalment became due, the plaintiff had delivered up to the defendants all the bills mentioned in the first schedule of the agreement except two. These bills were drawn on the defendants in sets of three, in the usual form of foreign bills. They were thus described in the schedule:—

| Date of Bill | By whom Drawn. | To whom Payable. | When Due. | Amount. |
|--------------|----------------|------------------|-----------|---------|
| February 15  | Merritt        | J. Kearney       | April 30  | 100     |
| " 18         | Ditto          | Ditto            | " 30      | 200     |

The plaintiff, who was a witness, stated, that he had sent the first and second of the bill, dated the 15th of February, to England, where they were protested for non-acceptance, and sent back to him at Colon, but he had never since then been able to find them. He had delivered up to the Company the third of that bill. The plaintiff also stated, that he purchased at Colon the first of the bill of the 18th February, and remitted it by post to his agent in London, who never received it, and it was not known what had become of it. The plaintiff delivered up to the Company the second of that bill, and the third was in his possession.

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It was objected, on the part of the defendants, that the delivery to them by the plaintiff of one part of each bill, was no performance of his contract to deliver up the bill, so as to entitle him to the last instalment. The learned Judge was of that opinion, and directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for him.

*Montagu Chambers*, in the following term, obtained a rule nisi accordingly, against which

*Rose* now shewed cause.—The object of the provision was, that the defendants should be absolved from responsibility in respect of the bills mentioned in the first schedule, and therefore the parties stipulate, that all these bills shall be delivered up before the last instalment is paid. If the plaintiff does not deliver up every part of each bill, no matter by what cause he is prevented, he has not performed his part of the contract. There is a further stipulation, that he shall procure at his own expence, from the holders, such of the bills as are not in his possession. The obvious intention was each bill should be delivered up in its entirety. A bona fide holder for value of any one part would have a right to payment: *Holdsworth v. Hunter* (a). *Perreira v. Jopp* (b) shews that the person who first obtains the acceptance of any one of a set of bills is entitled to the whole of them. Here the first of one bill being outstanding, the defendants are not freed from liability by the delivery to them of the two other parts. The meaning of the agreement is, that there shall be such a transfer as will absolve the defendants from all responsibility in respect of these bills.

*Montagu Chambers, Lush and Raymond*, in support of the

(a) 10 B. & C. 449.

(b) 10 B. & C. 450, note.

rule.—It is a sufficient compliance with the agreement, if one of each set is delivered up. The obligation of the drawee is to pay the first of exchange, the second and third being unpaid; to pay the second, the first and third being unpaid; and to pay the third, the first and second being unpaid. The plaintiff undertakes to place himself in the situation of the holder of the bills, and he does so by obtaining one part of each bill. [Pollock, C. B.—If it should turn out that the other parts were accepted, and in the hands of a bona fide holder for value, the defendants would have no answer to an action on them.] Suppose the drawer kept the first part, and negotiated the second and third, if either of those parts was paid, the drawee would be discharged. [Pollock, C. B.—In Byles on Bills, p. 294, 5th ed., it is said, “The drawee should accept only one part; for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other also.”] If the holder indorses two parts to different persons, he may be liable on each; but, as regards the acceptor, if he has paid one part he is discharged as to the others. The question turns on the meaning of the word “bill.” Does it mean the contract between the parties, or the several sets of the bill which are only evidence of such contract? If the word “bill” be understood in its ordinary sense, the plaintiff has performed his contract by delivering up one of each set.

ALDERSON, B.—I am of opinion that the rule must be discharged. The defendants agree to pay the plaintiff a sum of money by instalments upon certain conditions, one of which is, that if the plaintiff shall not, before the last instalment becomes due, have delivered up to the defendants “*the bills* mentioned in the first schedule,” the payment of the instalments shall be postponed until such delivery;

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therefore the plaintiff is not entitled to succeed in this actionunless the delivery has been made. The bills were drawn in sets of three; some of the parts were handed over by the plaintiff to the defendants, but others were not, and there is no reasonable ground for saying that the defendants may not be liable to the holders of those parts of the bills, notwithstanding the other parts have been delivered up to them. That being so, the plaintiff has not performed his contract. It is true that the agreement contains a clause that the plaintiff will indemnify the defendants against all liability in respect of the bills, but that is only a provision *ex majore cautelâ*: the plaintiff has undertaken to deliver up the bills, and not having done so, he has not performed his contract.

BRAMWELL, B.—The question is whether the plaintiff has complied with the condition precedent, to “deliver up *the bills*,” when he has delivered up one part of them, they being drawn in sets of three. It is argued, that the part delivered up is “*the bill*,” because the plaintiff has delivered it up, or, in other words, that as soon as he has delivered it up it becomes “*the bill*,” because, that part being paid, all the others are discharged. I cannot agree with that proposition as applicable to this case. It seems to me that the object of the provision was that the defendants should have protection against any responsibility in respect of these bills, and that it must have been intended that all the parts of the bills should be delivered up to them. Possibly, if it had happened that some of the parts were destroyed so as not to exist, the delivery of the other parts might be a delivery of “*the bills*;” but that is not this case. The whole three sets make “*the bill*;” it is a bill in form tripartite, and the defendants do not get “*the bill*” because they only get one part of it.

WATSON, B.—I am of the same opinion. The defendants contract to pay the plaintiff a certain sum of money when he has delivered up to them "the bills" mentioned in a schedule. It has been properly argued that the question turns on the meaning of the word "bill." Does it mean one of the parts, the bills being drawn in sets of three? In my opinion that was not the intention of the parties. The plaintiff may have indorsed one of the parts, and therefore it is provided, not only that he shall deliver up the bills, but also that he shall procure, at his own expense, from the holders, such of the bills as are not in his possession. I do not say that if one of the parts had been destroyed, the delivery of the others might not have been a substantial performance of the contract. That, however, is not the case here; the parts of the bill which were protested for non-acceptance may have got into the hands of a bona fide holder for value, and the defendants would have no answer to an action by him; therefore I think that the word "bill" means all the parts of it.

POLLOCK, C. B., concurred.

At the suggestion of the Court the rule was made absolute to enter a nonsuit.

Rule accordingly.

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## LUCAS v. WILKINSON.

The plaintiff, at the request of M. her solicitor, lent to the defendant 200*l.* on the security of his bond. M. was also the solicitor of the defendant, and was accustomed to receive his rents and make payments on his account. The plaintiff applied to M. for payment of the bond. M., who was then indebted to the defendant, borrowed the amount from a bank, with whom he deposited the bond as a security, and with the money so borrowed paid the bond. The defendant had no knowledge of this transaction. M. afterwards died insolvent, and the bank sued the defendant on the bond in the name of the plaintiff.

*Held,* that there was no payment of the bond by the defendant.

**D**ECLARATION on a bond, whereby the defendant became bound to the plaintiff in the sum of 400*l.*

**Plea.**—That the bond was subject to a condition for rendering the same void on payment of the sum of 200*l.* and interest on a certain day therein mentioned, and that after the day in the condition, and before the commencement of the suit, the defendant paid to the plaintiff the sum of 200*l.* in the condition mentioned, together with all interest then due thereon.

Replication, joining issue on the plea.

At the trial before Pollock, C. B., at the last Surrey Assizes, it appeared that in September, 1853, the plaintiff, at the request of one Morris, her solicitor, lent to the defendant 200*l.* on the security of the bond in question. Morris was also the solicitor of the defendant, and was accustomed to receive his rents and other monies due to him, and make payments on his account. In June, 1855, the plaintiff applied to Morris for repayment of the bond debt and interest. Morris, who was largely indebted to the defendant, borrowed the amount of the Warwick and Leamington Bank, and he deposited with them the bond in question as a security. With the money so borrowed, Morris paid to the plaintiff the principal and interest due on the bond. The defendant had no knowledge whatever of this transaction. Morris afterwards died insolvent, and the present action was brought in the name of the plaintiff by the Warwick and Leamington Bank.

*Sensible,* per Bramwell, B., that the bond was not discharged, since the payment was not made by the obligor or any person authorized by him.

It was submitted on behalf of the plaintiff, that under the above circumstances, there was no payment *by the defendant* in discharge of the bond. A verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for her for the amount of principal and interest.

*Bovill*, in the present term, obtained a rule nisi accordingly, against which

*Montagu Chambers* and *Rose* now shewed cause.—The facts amount to payment of the bond by the defendant. Morris being indebted to the defendant, and being also authorized to receive money and make payments on his account; this was in effect a payment by Morris as the agent of the defendant and with his monies. It is clear that Morris meant to discharge the bond, for he made the payment in consequence of the request of the plaintiff. [*Bramwell*, B.—The transaction is the same as if Morris had said to the plaintiff, “The defendant cannot pay the bond, but in order that you may not be put to any inconvenience, I will pay the money and take the bond as a security.” Morris had no antecedent authority from the defendant to make the payment, and there can be no ratification because the payment was not made in the defendant’s name.] At all events, the bond having been satisfied by payment, the plaintiff has no right to sue upon it.

*Bovill* appeared to support the rule, but was not called upon to argue.

*ALDERSON*, B.—The rule must be absolute. The question is whether the defendant has proved that he paid this bond. The plaintiff is merely a nominal plaintiff, the real

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plaintiff being the Warwick and Leamington Bank. It appears that the plaintiff intimated to Morris her wish to have the money due on the bond. Morris, who acted as the attorney both of the plaintiff and defendant, borrowed the money of the bank on the security of the bond, and with the money so borrowed paid the plaintiff the amount due. Morris having pledged his own credit with the bank, and the bond being in their possession as a security for the debt, how can it be said that the defendant paid the bond? Morris paid it, pledging his own credit, and the bank with whom the bond was deposited stands in the same situation as the plaintiff, and has a right to sue on the bond in her name. The defendant never paid the bond—it was not his money, it was not money in his hands, and the money was not paid by him.

BRAMWELL, B.—I am of the same opinion. I am also inclined to think that when the facts of the case are looked at, the plaintiff has not been paid this bond, because she does not get the money from the obligor, who was alone competent to discharge it, or from any one who acted with his authority.

WATSON, B.—I am of the same opinion.

POLLOCK, C. B.—I agree that the rule ought to be absolute. The plea is a plea of payment by the defendant to the plaintiff, and I am of opinion that there has been no such payment. It appears that the plaintiff applied to Morris for the money due on the bond. Morris not having the money, without any authority from the defendant, went to the bank, borrowed the money on the security of the bond, and with the money so borrowed paid the bond. At the trial it occurred to me that the case might be put in

this way:—Morris, being the attorney of the defendant, and acting for him in the receipt and payment of his monies, paid this money, as his agent, in discharge of the bond. But that view is not correct. If, indeed, there had been an application by the plaintiff, not to Morris, but to the defendant, and the defendant had said to Morris, "I desire you to pay the bond—you have money of mine in your hands," and then Morris had borrowed the money and paid it, that would have amounted to payment by the defendant. But the facts of this case will not bear that construction; for the money paid by Morris was his own money, not the money of the defendant, and it was paid without any authority from the defendant.

Rule absolute.

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GARDNER v. CAZENOVE and Others.

Nov. 11.

THE declaration in this cause was for money received by the defendants to the use of the plaintiff. The defendants pleaded that they were never indebted. The action was tried before *Willes*, J., at the last Liverpool Assizes, when a verdict was found for the plaintiff, with 1000*l.* damages, subject to the opinion of the Court on the following case:—

sailed from London on a voyage to San Francisco and thence on a seeking voyage home. In June 1854, the captain, who was sent out by D. to take charge of the vessel, chartered it to load a cargo of flour for Sydney. Some days before the bill of exchange became due, D. Y. & Co. requested the plaintiff to renew it, and he consented to do so on having the vessel transferred to him as a security. The vessel was accordingly transferred to him by deed of assignment which was in the form of an absolute sale. In October 1854, the captain, who had no knowledge of the assignment, received 1000*l.* on account of freight, and remitted it to D. Y. & Co. by a bill of exchange. In November 1854, D. Y. & Co., who had acted as ship's husband, became bankrupt. Held: first, that though the assignment was in form absolute, yet the Court might look to the real nature of the transaction and see that it was by way of mortgage only.

Secondly: that the plaintiff, being only a mortgagee and not having taken any step to obtain possession, was not entitled to the freight.

In July 1853, the plaintiff being the owner of a ship, sold it to D., of the firm of D. Y. & Co., for 4725*l.*, and received in payment the draft of D. Y. & Co. on B. at twelve months date. In Sept. 1853, the ship

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In July, 1853, the plaintiff was sole owner of the ship "Hannah," of the port of Liverpool, and he, in that month, sold the ship to George Deane, of the firm Deane, Youle, and Co., of Liverpool, merchants, and to John Bradbury, of Dobcross, in the county of York, manufacturer, for 4725*l*. It was agreed that the plaintiff should receive in payment the draft of Deane, Youle, and Co., on and accepted by the said John Bradbury for the sum of 4725*l*, payable twelve months after date. The said acceptance was given, and the plaintiff transferred 32-64ths of the said vessel to the said George Deane, and the other 32-64ths to the said John Bradbury. The said George Deane and John Bradbury became, in the month of July, 1853, registered owners of the said ship in the proportions before mentioned.

In September, 1853, the "Hannah" sailed from London on a voyage to Pernambuco, thence to San Francisco, thence on a seeking voyage home. Captain Bower was the master of the vessel when she left England, and was appointed by Messrs. Deane, Youle, and Co. Captain Bower having died on the voyage, Captain W. H. Brown was sent out, in November, 1853, by Deane and Bradbury, to Valparaiso, to take charge of the vessel, and he accordingly took charge and command of her, at Valparaiso, in March, 1854. On the 19th of June, 1854, Captain Brown chartered the vessel to proceed from Valparaiso to Conception Bay, and there load a cargo of flour for Sydney.

The plaintiff was examined in the Court of Bankruptcy, after the bankruptcy of Deane, Youle, and Co., and it has been agreed that his examination should be admitted as evidence on the part of both parties. In the course of that examination, he stated that some days before the bill of exchange of the 5th July, 1853, became due, Mr. Youle, the partner of Mr. Deane, of the firm of Deane, Youle, and

Co., called upon the plaintiff and stated to him, with Mr. Bradbury's compliments, that if it was convenient to the plaintiff, Mr. Bradbury would be glad that the bill should be renewed: that the plaintiff asked Mr. Youle if he was satisfied that everything was right, and told him that if everything was quite right, it was convenient, and that he, the plaintiff, would renew the bill for four months. The plaintiff told Mr. Youle that he must insist upon having the vessel transferred, and the following is a copy of the remainder of his examination on this part of the subject:—

Was the bill renewed?

It was some days afterwards; but before I renewed the bill I told Mr. Youle I must insist upon having the vessel transferred.

What was his answer?

I stated to him that there might not be time to prepare the transfer, but he was to pledge himself to procure me the transfer as a security if the second bill was not paid.

In the conversation between you and Mr. Youle, did anything pass between you as to the repurchase by you of the vessel?

No: if the bill had been paid, I had no right to the vessel.

Can you say what consideration was expressed in the bill of sale?

I cannot: Mr. Youle told me that Mr. Deane, with Mr. Bradbury, would transfer the vessel. I have no doubt that the amount of the renewed bill would be stated in the bill of sale. There was a mistake of 100*l.* in the amount mentioned in the bill.

Was there any bargaining or haggling between you and Mr. Youle as to the price?

No; because it was the amount before, with interest.

Had no alteration taken place in the value of the vessel,

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or its stores, between the time of the sale by you and the retransfer to you?

I objected that the vessel was twelve months older, to which Mr. Youle answered, that there had been money laid out upon her, and that she was worth as much or more than the original price; and, also, that she would be entitled to a great freight. All things considered, I thought I should be safe in renewing the bill.

He was afterwards asked, "Did you inform Mr. Buckley of the arrangement come to by you with Mr. Youle?"

No.

By mistake, the renewed bill was given for the sum of 4625*l.* instead of 4725*l.*, and the sum of 100*l.* was paid in cash by Deane, Youle, and Co. to the plaintiff, in consequence of the mistake in the amount of the bill, together with 97*l.* 19*s.* 5*d.* for four months interest and bank commission. On the 30th and 31st days of August, 1854, the said George Deane and John Bradbury, by two bills of sale, dated respectively on these days, and both recorded in the Custom House, Liverpool, on the 5th day of September, 1854, transferred the said ship "Hannah" to the plaintiff; and he was thereupon, on the 5th day of September, 1854, registered at Liverpool as sole owner thereof, and not as mortgagee. The following is a copy of the bill of sale from the said George Deane to the plaintiff:—

"Know all men by these presents, that I George Deane, of Liverpool, for and in consideration of the sum of two thousand and four hundred pounds of lawful money of Great Britain, to me in hand at or before the ensealing and delivery of these presents, by Robert Gardner, of Manchester, in the county of Lancaster, merchant, well and truly paid, the receipt whereof I do hereby acknowledge and myself to be therewith fully satisfied, have granted, bargained, sold, assigned, and set over, and by these

presents do fully, freely, and absolutely grant, bargain, sell, assign, and set over unto the said Robert Gardner thirty-two sixty-fourth parts or shares of and in the ship or vessel called the 'Hannah:' all and singular the masts, sails, sail yards, anchors, cables, ropes, cords, guns, gunpowder, ammunition, small arms, tackle, apparel, boats, oars, and appurtenances whatsoever to the said vessel belonging, or in anywise appertaining; which said ship or vessel has been duly registered pursuant to an act of parliament for that purpose.—(Then followed the certificate of British registry.)—To have and to hold the said thirty-two sixty-fourth shares in the said ship, and all other the above bargained premises, unto the said Robert Gardner, his executors, &c., to their own use and uses, and as their own proper goods and chattels from thenceforth for ever. And I, the said George Deane, do hereby for myself, my executors, &c., covenant, promise, and agree to and with the said Robert Gardner, his executors, &c., in manner following, that is to say, that at the time of the sealing and delivery hereof, I the said George Deane have in myself good right, full power, and lawful authority to grant, bargain, sell, assign and set over the said hereby bargained premises unto the said Robert Gardner, his executors, &c., in manner and form aforesaid: And that the said hereby bargained premises, and every part thereof, now are, and so from henceforth for ever shall be, remain, and continue unto the said Robert Gardner, his executors, &c., free and clear, freely and clearly acquitted and discharged of and from all former bargains, sales, gifts, grants, titles, debts, charges and incumbrances.—(Then followed a covenant by Deane for further assurance.)—In witness whereof I have hereunto set my hand and seal, the 13th day of August, 1854.

"GEORGE DEANE."

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The bill of sale from the said John Bradbury to the plaintiff was precisely similar.

The "Hannah" sailed, on the 22nd day of July, 1854, from Conception Bay, on the voyage before mentioned, and arrived in Sydney on the 21st day of September, 1854. On the 23rd October, 1854, Captain Brown received 1000*l.* on account of the freight of the vessel from Conception Bay to Sydney, and on that day he remitted the amount in a bill of exchange for 1000*l.* inclosed in the following letter, addressed outside to Deane, Youle, and Co., inside to George Deane:—

"Sydney, October 21st, 1854.

"Sir.—In my last letter to you I was not aware the agents would pay freight before the true delivery of the cargo, but on enquiry I find they had no objection; and as the mail closes at noon to-day, for the Great Britain leaving Melbourne on the 28th of this month, I have sent the first of exchange for 1000*l.* sterling, the remainder I will remit by the steamer Calcutta, arrived to-day; the second of these I will send by the first opportunity. My cargo is not yet discharged. I have on board about forty tons of tallow; the remainder, already engaged, will be on board in a few days. There are many ships laid on here for England, but I am sure to get whatever freight is going, and hope to have quick despatch.

"I am, &c.

"W. H. BROWN."

The said W. H. Brown had no notice or knowledge of the transfer of the "Hannah" to the plaintiff until after his arrival in England in the month of May, 1855. On the 13th day of November, 1854, the firm of Deane, Youle, and Co. were adjudged bankrupts, and the defendants were duly appointed their assignees.

From the month of July, 1853, to the time of their

bankruptcy, the firm of Deane, Youle, and Co. acted as ship's husbands to the said ship *Hannah*, and the balance of the expenditure of the firm of Deane, Youle, and Co., as such ship's husbands, on the outfit and disbursements of the said ship on the voyage hereinbefore mentioned, prior to the 30th of August, 1854, above all receipts, exceeded 2000*l.*, which has never been paid to them. The firm of Deane, Youle, and Co. made no further advances in respect of the said ship, but the defendants, since the bankruptcy of Messrs. Deane, Youle, and Co., have expended 65*l.* 5*s.* for insurance upon the freight of the said vessel from Conception Bay to Sydney, which has never been repaid to them.

On the 7th November, 1854, the bill of exchange for the sum of 4625*l.* became due, and not being paid by either the drawers or the acceptor thereof, was taken up by the plaintiff.

On the 26th December, 1854, the plaintiff transferred and assigned the "*Hannah*," by an absolute bill of sale, and also the freight earned by the said ship, to Charles James Buckley, of Ashton-under-Lyne, banker, in consideration of the sum of 4786*l.* The above sum of 4786*l.* did no more than repay the plaintiff the amount of the renewed bill, and interest thereon, and the necessary expenses he had been put to, and the plaintiff made no profit out of the whole transaction.

On the 24th January, 1855, the bill of exchange for 1000*l.* arrived in England, was received by the defendants, and was indorsed by the defendant, James Cazenove, as official assignee of the estate of the firm of Deane, Youle, and Co. On the 28th of February, 1855, the bill became due and was duly honoured, and the amount thereof received by the defendants.

The action is brought to recover the sum of 1000*l.* so

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received by the defendants, and the plaintiff is suing in this action on behalf of the said Charles James Buckley. The said C. J. Buckley has since received the homeward freight of the said vessel, and has sold the said vessel, and realised by such freight and sale, after paying the disbursements, the sum of 3286*l.*

The Court is to be at liberty to draw any inference of fact which a jury might draw.

If the Court is of opinion that the plaintiff is entitled to recover the said sum of 1000*l.* the verdict is to stand; but if the Court is of opinion that the plaintiff is not entitled to recover the said sum of 1000*l.*, then the verdict is to be entered for the defendants. If the Court is of opinion that the plaintiff is entitled to recover in this action, but that the defendants are entitled to deduct the said sum of 65*l. 5s.* from the amount of the damages, then the damages are to be reduced by that amount.

Mellish (*Wilde* with him), for the plaintiff.—The question depends on how far the assignment of a ship before it arrives entitles the assignee to the accruing freight. No doubt, if there is an *absolute sale*, the assignment passes to the vendee the growing freight,—not indeed so as to enable him to maintain an action for it in his own name, but, as between the vendor and vendee, the latter is entitled to it, and, if the vendor receives it, the vendee may recover it as money received to his use. It would seem, from the authorities, that, in the case of a mortgage, the mortgagee is not in general entitled to the accruing freight unless he has taken possession. Here there is, *in form*, an absolute assignment of the ship; but facts are stated from which it may be inferred that the assignment, though absolute, was only intended as a security for the payment of the renewed bill of exchange. The question then is, what is the rule as

to accruing freight where the instrument of transfer is so framed? In order to determine that, it is necessary to consider why, in the case of a mortgage, the mortgagor is entitled to the accruing freight, unless the mortgagee has taken possession. It cannot proceed from any difference in the form of the assignment, for, in a mortgage, the assignment passes the legal estate the same as in a sale. The reason is that, in the case of a mortgage, you infer an intention that the mortgagor shall remain the real owner,—that he shall run the risk and enjoy the profit, except so far as is necessary for the security of the mortgagee; and that so long as the mortgagee allows the mortgagor to remain in possession a presumption arises that he intends him to enjoy the accruing freight. It is the same in the case of a sale or mortgage of land: if there is an absolute sale, and the vendor afterwards receives the accruing rents, the vendee may recover the amount as money received to his use; but in the case of a mortgage, unless the mortgagee takes some step to enforce his right, it will be inferred that he intended the mortgagee to receive the profits of the land for his own use. Therefore, the question depends on the intention of the parties. In the case of a purchase, the intention is that the purchaser shall have the accruing profits; but it is otherwise in the case of a mortgage. From the facts here stated it may be inferred that it was the intention of the parties that the accruing freight should belong to the plaintiff. He refused to renew the bill unless he had a transfer of the ship; and when he objected that the ship was twelve months older, the answer was, that "she would be entitled to a great freight." The covenant in the deed of transfer uses the words "hereby bargained premises and every part thereof," and the accruing freight is part of the bargained premises. There is ample evidence of an agreement by Deane and Co. to hold the freight, when received,

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to the use of the plaintiff. It is not contended that the mere transfer of the ship would of itself make Deane and Co. agents for the plaintiff unless they attorned, but here there is evidence of agency. It will be argued that Deane and Co., as ship's husband, had a lien on the freight for disbursements; but suppose that they had been distinct persons from the owner of the ship, what would have been the effect of the transfer? It is true that the mere assignment of a ship, whether by way of sale or mortgage, will not render the ship's husband agent for the assignee instead of the assignor; but if the assignee gives the ship's husband notice of the assignment, and that he is entitled to the accruing freight, and the other agrees to hold it, when received, for him, that is binding on the latter. The facts here stated are tantamount to that. Why does the plaintiff require an absolute transfer? The obvious answer is, that, for the purpose of enabling him to realize the security, he desired to have all the rights of a vendee. *Morrison v. Parsons* (*a*) decided that if the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assigns the charter-party to another, if she earns freight the assignee of the ship is entitled to the freight as incident to the ship. In like manner, an abandonment to the underwriter on ship transfers the freight subsequently earned: *Case v. Davidson* (*b*). In *Stewart v. The Greenock Marine Insurance Company* (*c*) the abandonment did not take place until after the cargo was discharged and the freight received by the owner; yet it was held that the underwriter on ship was entitled to the freight. *Chinnery v. Blackburne* (*d*) is generally referred to as deciding that a mortgagee is not entitled to freight unless he has taken possession; but the case is no authority for that proposition, because there the

(*a*) 2 *Taunt.* 407.

(*c*) 2 *H. L.* 159.

(*b*) 5 *M. & Sel.* 79.

(*d*) 1 *H. Blac.* 117, note.

mortgagee sued for the freight in his own name, and the action would equally have failed if he had been a vendee. *Kerswill v. Bishop* (*a*) decided that accruing freight passes to a mortgagee who takes possession before the conclusion of the voyage, notwithstanding the 6 Geo. 4, c. 110, s. 45, which enacts that the mortgagee shall not be deemed owner except so far as necessary for the purpose of rendering the ship available for the payment of the mortgage debt. It will be, perhaps, argued that, though the plaintiff may be entitled as against Deane and Co., yet he is not entitled as against the defendants, their assignees, inasmuch as there is no privity between the plaintiffs and the assignees; but if Deane and Co. were the agents of the plaintiff to receive this freight, the defendants are in the same position.—He also referred to *Mackenzie v. Pooley* (*b*).

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Hugh Hill (*Blackburn* with him), for the defendant.—The true meaning of the contract is, that if the renewed bill of exchange was dishonoured the plaintiff should be at liberty to take possession of the ship, but if the bill was paid the plaintiff to have no title to the ship. Though the assignment is in form absolute, the Court may look at all the circumstances and see whether it was the intention of the parties that the plaintiff should be absolute owner or only mortgagee. *Myers v. Willis* (*c*), and *Langton v. Horton* (*d*) are authorities that a bill of sale of a ship, though absolute in its terms, may, notwithstanding the Ship Registry Acts, be held a mortgage, if such appears to have been the real intention of the parties; *Goodman v. Grierson* (*e*) also shews that the real nature of the transaction may be inquired into. Freight is not an incident necessarily

- (*a*) 2 C. & J. 529.
(*b*) 11 Exch. 638.
(*c*) 17 C. B. 77.

- (*d*) 5 Beav. 9.
(*e*) 2 Ball & B. 274.

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attached to property in the ship, and it may well be severed by parol: *Mestaer v. Gillespie* (*a*), *Davenport v. Whitmore* (*b*). A mortgagee has no right to freight unless he is in possession of the ship. Here, at the time when the vessel arrived at Sydney, the plaintiff had done no act for the purpose of taking possession. The captain was not the agent of the plaintiff. If the bill, which the captain sent to England, had been lost, would the loss have fallen on the plaintiff? The argument for the plaintiff must go to this extent, that what happened in England between the 19th of June and 21st of October, by operation of law and contrary to the intention of the captain, made him the agent of the plaintiff, so that the freight was received for him, and the bill purchased by the captain was so specifically his that he might sue in trover for it.

Mellish, in reply, argued that the intention of the parties was, that if the renewed bill was dishonoured, the plaintiff should have all the rights which he would have had if there had been an absolute sale.

POLLOCK, C. B.—We are all agreed that the verdict ought to be entered for the defendants. There is no real difference on either side as to the law, and the dispute is rather one of fact. The question is whether we are to infer that the parties intended and agreed that the plaintiff should have all the benefits of an absolute owner, and yet be only in the situation of a mortgagee. If such a bargain had been made in specific terms we must have given effect to it, but we cannot infer from doubtful expressions that the parties intended to make such a bargain. The law recognises two interests with respect to the subject-matter,—that of absolute owner and that of mortgagee. A mortgagee may

(*a*) 11 Ves. 629.

(*b*) 2 Myl. & C. 177.

have, according to circumstances, more or less power. It is established by the authorities, that an owner is entitled to freight from the time that the ceremonies have been gone through which are necessary to transfer to him the title, so that he would have a right to all the freight which the ship was then earning. On the other hand, a mortgagee though for many purposes an owner, is not entitled to the freight until he has taken possession. The main stress of Mr. *Mellish's* argument was, that the plaintiff was to be substantially a mortgagee, but with every right of an owner in possession, in other words, that he was to take the benefit as mortgagee, without being liable to the burthen as owner. In my opinion we cannot give effect to that argument on any of the grounds which have been urged. The expression of the plaintiff himself amounts to no more than this, that if the bills were paid the conveyance was to come to nothing; if they were not paid the plaintiff was to have the ship, not as absolute owner but as mortgagee. It is argued, that a conveyance of this sort must be understood to mean a conveyance of all the intermediate profits; but the Court will look to the real character of the transaction, and if it appears that the plaintiff took as mortgagee, will not treat him as absolute owner. Then the plaintiff, being mortgagee, and not having taken possession or done any act equivalent to it, is not entitled to the freight.

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BRAMWELL, B.—I am of the same opinion. Assuming that the defendants, as assignees, are as much liable as Deane, Youle, and Co. would have been, and assuming that Deane, Youle, and Co. would have been as much liable as the assignor or mortgagor to the plaintiff; the question is whether, if the assignor or mortgagor had received the amount of the freight, there would have been any duty, as between him and the plaintiff, to pay it over to the plaintiff

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There is no dispute as to the law. Both parties admit that if there is an absolute assignment of a ship, the assignee is entitled to all the earnings; if the assignment is by way of mortgage, with no intention of the assignee taking immediate possession, he is not entitled to the earnings until he has entered and taken possession. The question in these cases is, for whom is the ship working? If this had been in reality an absolute assignment, it was competent to the transferee to take possession and use the ship, and so there would have been no contradiction to the deed. But in fact he has not done so, and we find that this, though in form absolute, was in reality an assignment by way of mortgage only. Mr. *Mellish* says that, although it is only a mortgage, still it was the intention of the mortgagor that the mortgagee should receive all the earnings; and that inasmuch as the assignment is absolute, the burthen of shewing that the rights of an assignee do not attach is upon the defendants. I think that the onus is on the plaintiffs to shew an obligation to pay over the freight to him. The plaintiff allows the defendant to receive the freight, and how does he make out that the defendant is under any obligation to pay it over? I do not see any evidence that the plaintiff's rights are different from what they would have been if the instrument was on the face of it a mortgage. Then inasmuch as the plaintiff has not done any act shewing himself to be a mortgagee in possession, or anything tantamount to taking possession; and inasmuch as this money was actually paid over by the captain, before the plaintiff did any act to take possession, I think that there was no obligation on the part of the defendants to the plaintiff in respect of this money. The argument of Mr. *Hill* seems to me conclusive. Suppose the bill had been lost at any time after the captain received it; or suppose the captain had embezzled the

1000*l.*, would the plaintiff have been subject to the loss? Certainly not. It is like the case of a mortgagee, who does not get some of the rent because a tenant fails. If the plaintiff has any right at all, he had it on the receipt of the money by the captain, and would have been entitled to have it from him. It is not necessary however to decide that point: my judgment proceeds on this ground, that the plaintiff is in substance a mortgagee; that he left the ship in the possession of the assignor or mortgagor, and before he took any step to put himself in possession of it, the money was paid by the charterer to the captain and received by the assignor; and consequently no part of the earnings of the ship are unrealized.

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WATSON, B.—I am entirely of the same opinion. I will treat the case as if Deane, Youle and Co. were not bankrupt. Then is this money received to the use of the plaintiff by Deane, Youle and Co.? Certainly not. When once it is admitted that the assignment is only by way of mortgage, it necessarily follows, that unless possession is taken by the mortgagee the freight does not belong to him. The distinction is pointed out in *Langton v. Horton* (*a*) by Lord Langdale, M. R., who says, “Where a ship at sea is sold, the seller is subject to an obligation as well as entitled to a profit, in respect of the freight accruing due. And the duty and the profit may well be held to pass together with the ship by means of which the duty is to be performed, and the profit to be acquired. Nevertheless, the title to the freight and the title to the ship are often separate, and the argument founded on analogy to the case of freight does not rest on a sure foundation.” Mr. Mellish contends that a Court of law cannot look at the instrument of transfer to see whether it

(*a*) 5 Beav. 20.

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is a mortgage security or not. But I think, that both at law and in equity, although an assignment is absolute on the face of it, the Court may look and see whether it is by way of pledge or sale. This assignment was by way of security only. It has been further argued that, looking at the mode in which the ship is transferred, it must be inferred from the document itself that the freight was intended to pass. But I think that if the document was meant to operate, not only as an assignment of the ship, but also of the freight, the freight would have been alluded to, and there would have been a provision that if the ship was disabled the assignee might take possession of the freight. Indeed, if the parties had intended to make the freight as well as the ship liable, they might have done so by introducing one word into the bill of sale. Moreover, if there had been any insurances upon the freight, and the plaintiff had required the security of it, the policies would have been mentioned in the deed. Again, if the plaintiff looked to the freight as a security, why did he not insure it? Both a Court of law and a Court of equity will look at the transfer and see what was really intended, whether a mortgage or an absolute sale; and when we find that in this case the assignment was in reality a mortgage, the plaintiff, not having taken possession, is not entitled to the freight.

Judgment for the defendants.



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THE declaration stated, that before and at the time of the committing of the grievances, &c., the plaintiffs were the owners of a cargo of guano, then on board, a ship called the "Sierra Nevada," which ship had arrived at the port of Liverpool from parts beyond the seas with the said cargo; and was then lawfully navigating in the said port, and the defendants long before and at the same time were the owners of a certain dock in the said port of Liverpool, called the Wellington Dock, made and constructed by the said trustees under the powers of a certain Act (7 & 8 Vict. c. lxxx.), and of the several Acts incorporated therewith; and under and by virtue of the said Acts, before and at the time of the committing the said grievances, were and still are entitled to receive, and did receive, divers port duties, &c., from and in respect of vessels navigating in the said port and otherwise, which said port duties, &c., the defendants were, under and by virtue of the said Acts, to apply and dispose of, and it was their duty under the same Acts to apply and dispose in and about, amongst other things, the maintaining, cleansing, supporting and preserving the said dock, to wit, so as to be in a fit state for vessels entering into and navigating the same; nevertheless, although before and at the time of the committing the said including the chairman, who has the custody of the common seal of the trustees, use, and exercise exclusively all and every the powers and authorities in relation to the execution and carrying into effect the several powers of the Liverpool Dock Acts, vested in the trustees by virtue of those Acts, subject to a power of veto in the trustees. *Held*, first, that though the trustees possessed sufficient funds to enable them to keep the docks in a proper condition, they were not responsible to the owners of a vessel injured by grounding on an accumulation of mud suffered to remain in the docks.

Secondly, that the trustees are not liable to an action for a neglect of duty by the committee.

The trustees of the Liverpool Docks are a corporation receiving tolls and port dues, for the purpose of discharging a public duty, from which the members derive no emolument, and they have a discretion as to the application of their funds, and as to the time and manner in which they will repair the docks.

By 6 Geo. 4. c. clxxvii., ss. 3. 4., it is provided that, in order to carry into execution the powers of the Liverpool Dock Acts a committee is to be appointed, twelve nominated by the corporation and eight by the merchants of Liverpool; and that the committee or any seven of them, should have,

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grievances, the sums of money and funds in the hands of the defendants, arising from and produced by the said duties, rates and charges, were fully sufficient and adequate for the maintaining, cleansing, supporting and preserving the said dock as aforesaid, in addition to the satisfaction and discharge of all other charges, liabilities, and incumbrances in and about the same, of all which the defendants, before and at the time of the committing the said grievances, had notice; yet the defendants neglected their duty, and did not take due and reasonable or any care, in or about the maintaining, cleansing, supporting or preserving the said dock, insomuch that the said vessel, in duly endeavouring to enter into and navigate the said dock, struck against and became embedded in a large bank or mass of mud, remaining, by and through the negligence of the defendants, in and about the entrance to the said dock, and in consequence thereof was damaged, and water and mud entered the same and damaged the said guano. And the defendants also neglected their duty in this, that well knowing that the said Wellington Dock and the entrance thereto were, by reason of certain great accumulations of mud therein, in an unfit state to be navigated and used by vessels then used and accustomed to navigate and use the same, they did not take due and reasonable care or any care to put the same into a fit state for that purpose; but on the contrary thereof, negligently suffered and permitted the said dock and the entrance thereto to be and continue while the same was, as they well knew, and by their permission, navigated and used by such vessels, in an unfit state to be so navigated and used for want of necessary and reasonable cleansing; insomuch that the said vessel being such vessel as was used and accustomed to navigate and use the said dock, in endeavouring to enter into and navigate the same, struck against and became embedded in the last mentioned accumulations of mud, and by reason

thereof mud and water entered the same and damaged the said guano.

Demurrer and joinder therein.

*Quain* (with whom was *Hugh Hill*), argued in support of the demurrer in last Easter Term (April 30).—The defendants are trustees under an act of parliament, acting in the execution of a public duty from which they derive no emolument, and are therefore not liable for mere acts of nonfeasance. The dock-masters, the servants of the trustees, may have been guilty of neglect, but the trustees are not therefore liable. That proposition was established in *Metcalfe v. Hetherington* (*a*). These trustees have a wider discretion as to the application of their funds than the trustees appear to have had under the Maryport Harbour Act. These trustees are substantially the same body as the corporation of the town. The affairs of the trustees are managed by a committee consisting of twenty-four persons, appointed in pursuance of the 14 & 15 Vict. c. lxiv. The Acts under which the docks have been built are very numerous, but the substance of them is as follows:—There are no shares and no capital stock. The docks were made with borrowed money. The trustees have no interest in the property, which is simply a public trust. If the income of the trust increases, the trustees are bound to reduce the rates so as to keep the income and expenditure on a level. By the 4 Vict. c. xxx., s. 124, the trustees are empowered to apply the monies raised under that and the previous Acts, in any order with respect to priority as to the trustees shall seem expedient, towards the completion of the several docks, &c., by the prior Acts and that Act authorized to be made, and towards the several objects in the several Acts mentioned, in the general management of the trust estate, and for carrying into execution

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all the provisions of the several Acts, and for the general improvement and reparation of the docks, basins and works of the trustees (*a*). Whatever might have been the responsibility of the corporation before the passing of this Act, this clause gives them a discretion for the exercise of which they cannot be made liable. The dock-masters are responsible; it was their duty not to have allowed the vessel to enter the dock if it was not in a fit state to receive her. In all the cases in which actions have been held to be maintainable against persons for non-feazance under Acts like those now in question, the action has been, not against the trustees, but against the persons guilty of negligence directly producing the injury complained of. The defendants were acting in strict accordance with the powers entrusted to them: *The Governor and Company of the British Cast Plate Manufacturers v. Meredith* (*b*), shews that for so doing they cannot be held liable. The 6 Geo. 4, c. clxxxvii., s. 134 (*c*), em-

(*a*) This enactment is, "That all the monies which shall be collected, levied, borrowed, or raised under and by virtue of the said recited Acts and this Act shall be applied, in any order with respect to priority of such application as to the said trustees shall seem expedient, in and towards the completion of the several docks, transit sheds, warehouses, and other works by the said recited Acts and this Act authorized to be made, formed, erected, and built, and for and towards the several objects and purposes in the said recited Acts and in this Act mentioned, in the general management and conducting the said trust estate, and carrying into execution all the provisions of the said several recited Acts and

this Act, and for the general improvement and reparation of the docks, basins and works of the said trustees."

(*b*) 4 T. R. 794.

(*c*) "And be it further enacted, That it shall and may be lawful to and for the said trustees, and they are hereby authorized and empowered, from time to time as they shall see occasion, to pay or cause to be paid, out of said rates and duties by this and the said Acts authorized to be levied and received, the amount of any damage occasioned by the insufficiency of any of the present or future works by this or the said Acts authorized to be established, or the amount of any damages sustained by the negligence or misconduct of any officers or servants

powers the trustees to pay for the damage occasioned by the insufficiency of their works or the negligence of their servants. The legislature assumes that the defendants will make compensation to parties injured, in cases where it is proper that compensation should be made. *Harris v. Baker* (*a*) and *Hall v. Smith* (*b*) are authorities that the defendants cannot be held responsible. In *Jones v. Bird* (*c*) the act complained of was an act of commission, and the persons held liable were those directly guilty of negligence in doing it. [Alderson, B.—The principle seems to be that if the trustees are bound to do a thing and they, neglecting their duty, do not do it, they are liable; it is otherwise if they have a discretionary power.] The omission must be an omission to do an act of perfect obligation. There was no obligation to expend the funds in removing the mud rather than in carrying out any of the other objects for which the funds are collected. [Martin, B.—The defendants have obtained power to make the docks and receive the dues; they have ample means enabling them to keep the docks in repair, and yet they have neglected to do so. Can there be a stronger instance of neglect of duty?] The defendants are a corporation and can only act by their officers. By 51 Geo. 3, c. cxliii., s. 79, as often as the trustees deem it necessary for the purpose of repairing the docks, &c., after notice, masters shall remove their vessels from the docks; and if they fail to do so, the harbour-master and the dock-masters have power to remove ships out of the docks to such station as they think fit. Sect. 81 empowers the harbour-master and dock-masters to direct the removal of vessels from one part of a dock to another. By s. 82 the harbour-master and dock-masters

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employed by the said trustees whilst acting under the orders and directions of the said trustees." ferred also to *Sutton v. Clarke*, 6 Taunt. 29.

(*a*) 4 M. & Sel. 27. He re-

(*b*) 2 Bing. 156.

(*c*) 5 B. & Ald. 837.

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have power to direct the time and manner of every ship coming into the docks. Sect. 86 imposes a penalty on any master bringing a vessel into the docks contrary to the directions of the harbour-master or dock-masters. The wrong, if any, was done by the harbour-master, in allowing the ship to enter a dock which required cleansing (a).

*Cleasby* (with whom were *Atherton* and *Wilde*), for the plaintiffs.—This case is not governed by *Metcalfe v. Hetherington* (b). That was an action against the clerk to the trustees, and the question was as to their personal liability. There is a duty cast upon the defendants to take reasonable care that the docks are kept in such a state that ships can enter them without danger. They were created a corporation, and they exist for the purpose of keeping these docks in a proper state. By 2 Geo. 3, c. 86, s. 5, the money borrowed is to be applied, after payment of expences &c., to the maintaining, cleansing, supporting and preserving the two present wet docks and piers, and the executing and performing of all necessary works in about and concerning the same. By the 51 Geo. 3, c. cxliii., s. 27, there is a power to reduce the rates, leaving sufficient for all charges of management, &c., and other concerns of the said docks, &c., and improving, repairing and maintaining the same. By s. 28 the trustees have power to advance the rates, as shall from time to time be expedient, for the purposes aforesaid. By s. 79, as often as the trustees deem it necessary for the purpose of repairing the whole or any part of the docks, they may give notice, and after such notice masters are to remove their ships from the docks. The 7 & 8 Vict. c. lxxx., s. 83, regulates the conditions under which the trustees are permitted to throw into the river the mud which may be taken out from the docks in cleans-

(a) As to harbour-masters and 111, 112.  
dock-master, 4 Vict. c. xxx., ss. (b) 11 Exch. 257.

ing them. There is a consideration for the obligation to keep the works in repair, viz., the possession of the funds provided for that purpose. The repair of the dock was the object which the legislature had in view. Surely there is a duty cast upon a corporation to take some care to do an act for the purpose of doing which it was created. They take "munus cum onere." In this respect the case resembles *Henley v. The Mayor of Lyme Regis* (*a*), where an action was held to be maintainable against a corporation, for not repairing sea walls which they were directed to repair by a charter from the Crown, conveying a borough and pier, or quay with tolls, to the corporation. Here the trustees receive the funds intrusted to them for their own purposes as a body corporate. There has been a neglect of the duty, for the performance of which they were created; and to enable them to perform which tolls were granted to them which they have accepted. [Pollock, C. B.—For what purpose do they take the tolls; do they take them for their own use? That seems to be the question. Do you contend that an action would lie against the corporation of the Trinity House for not laying down buoys?] The cases as to public officers (*b*) do not shew that the defendants are not liable. If a person takes a reward for the discharge of a public duty, any one who has sustained an injury by reason of his neglect may maintain an action against him. The principle recognised in *Blakemore v. Glamorganshire Canal Company* (*c*), that acts of parliament like those now in question are parliamentary contracts, establishes the liability of the defendants. Here the trustees exist as a corporation only for the purpose of discharging a particular duty. Are they then to be considered as a wholly irre-

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(a) 5 Bing. 91; S. C. In Error, *mand*, 1 T. R. 172.  
3 B. & Ad. 77. In Dom. Proc. 1 (c) See per *Parke*, B., 2 C. M.  
Bing. N. C. 222. & R. 141.

(b) See *Macbeath v. Haldi*.

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sponsible body? The defendants must contend that they have a discretion to allow the harbour to be out of repair. [Alderson, B.—The trustees have a discretion as to the time and manner in which they will repair. They could not be indicted for not repairing.] The discretion as to the mode of employing the funds is not sufficient to exempt the trustees from responsibility. Discretionary powers must be exercised, subject to law and reason: *Leader v. Mozon*(a). There is a duty at common law; the trustees having the entire control of the docks and taking tolls in respect of them, are bound, as long as they admit vessels, to take some care to keep the docks in such a state as not to be dangerous to vessels entering them: *Parnaby v. The Lancaster Canal Company*(b). The only distinction between that case and the present is, that there the Company were shareholders, here the trustees are trustees for the bondholders. (He referred also to *White v. Crisp*(c) and *Brown v. Mallett*(d).) By the 6 Geo. 4, c. clxxxvii., s. 134, the trustees are authorized to pay, from time to time as they shall see occasion, out of the rates authorized by that Act to be levied, the amount of any damage occasioned by the insufficiency of the works, or the negligence of the officers employed by the trustees. Here the injury was caused by the insufficiency of the works, and this clause affords an answer to the argument that paying damage would be a misapplication of the funds. [Pollock, C. B.—It appears to me that the legislature never contemplated that an action would lie against the trustees.]

Quain, in reply.—In all the cases cited, the actions have been against companies formed for private gain. *Henley v. Mayor of Lyme Regis*(e) differs from the present case.

(a) 2 W. Bl. 924.

(d) 5 C. B. 599.

(b) 11 A. &amp; E. 223.

(e) 1 Bing. N.C. 222, 237.

(c) 10 Exch. 312.

In the House of Lords (*a*) Park, J., in delivering the opinion of the Judges, put the liability on the ground of express contract. The plaintiff must contend that an indictment would lie. The case of *Metcalfe v. Hetherington* (*b*) is not distinguishable from the present.

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*Cur. adv. vult.*

POLLOCK, C. B., in Trinity Term, (May 22), said.—It appears that by 6 Geo. 4, c. clxxxvii., s. 3 (*c*), it was pro-

(*a*) 1 Bing. N. C. 222, 237.

(*b*) 11 Exch. 257.

(*c*) Sect. 3. "And be it further enacted, That in order to carry into execution the powers and authorities by the said recited acts and this act vested in the said trustees, and the management and conducting of their estate and interest in the said trust a committee of twenty-one persons, including the chairman and deputy chairman, of such committee, to be called 'The Committee for the affairs of the Estates of the Trustees of the Liverpool Docks,' shall be elected," "and the said committee, when duly elected, nominated and appointed, shall from time to time, when and so often as shall appear requisite to the said chairman or deputy chairman, but in no case less frequently than once in each week, be summoned to meet at such times and places as shall in such summons or notice be expressed; and the said committee, when so assembled, or any seven or more of them, including the

chairman or deputy chairman, shall have, use, and exercise exclusively all and every the powers and authorities, in relation to the execution and carrying into effect the several purposes of this act and the said recited acts, given to and vested in the said trustees by virtue of this act and the said recited acts."

Sect. 4. "Provided always, and be it enacted, That all and every the proceedings of the committee hereinbefore mentioned shall be entered in proper books, and such books shall be laid before the said trustees assembled in the usual monthly council of the mayor, aldermen, bailiffs, and common council of Liverpool, or at any special meeting of the said trustees, for confirmation or rejection thereof; but that all the proceedings, resolutions, and directions of the said committee shall be final and conclusive, unless the same be annulled or made void by such trustees in common council assembled at their general monthly meeting, subsequent to the day

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vided that in order to carry into execution the powers and authorities of the recited Acts (Liverpool Dock Acts) and that Act, a committee of twenty-one persons, including a chairman and deputy-chairman, to be called "The committee for the affairs of the estate of the Liverpool Dock," should be elected; and that there should be thirteen trustees nominated by the corporation and eight by the merchants of Liverpool; and that the said committee when assembled, or any seven or more of them including the chairman, should have, use and exercise exclusively all and every the powers and authorities, in relation to the execution and carrying into effect the several purposes of that Act and the recited Acts, given to and vested in the trustees by virtue of that Act and the recited Acts. It appears from this section that the trustees of the Liverpool Docks have no power whatever, and that the control of the docks is exclusively conferred upon another and distinct body. This not having been adverted to in the argument, it becomes necessary that the case should be re-argued upon this point.

*Quain* (with whom was *Hugh Hill*) now appeared for the defendants, but the Court called on

*Cleasby* (with whom were *Atherton* and *Wilde*), to support

on which such proceedings, resolutions, or directions of the said committee shall have been had or made, or at a special meeting of the said trustees to be held within one week next after the said general monthly council day, and unless two-thirds of the said trustees or members of such common council or special meeting present at such common council or special meet-

ing, shall direct the same to be annulled or made void; but no order or resolution of such committee, directing the dismissal of any officer or servant of the said trustees, shall at any time be revoked or annulled by such common council or meeting of the said trustees." See 14 & 15 Vict., c. lxiv., ss. 2, 3, 4, 5, &c.

the declaration.—The powers conferred by the Acts are vested in the committee who act on behalf of the trustees. The acts of the committee are the acts of the trustees. By the 6 Geo. 4, c. clxxxvii., s. 3, a committee appointed in a particular way are to exercise all the powers vested in the trustees. It is suggested that the trustees are not responsible, because the committee is not appointed by the trustees. The corporation of the trustees of the Liverpool Docks is constituted by 51 Geo. 3, c. cxlii., s. 1. It consists of the mayor, alderman, bailiffs and common council, that is to say, the governing body of the old corporation, which consisted of the mayor, bailiffs, and burgesses of the borough of Liverpool. The trustees form a body distinct from the municipal corporation and hold separate property. The 7 & 8 Vict. c. lxxx., s. 137, contains provisions enabling the trustees of the Liverpool Docks to purchase lands from the corporation of the borough. The corporation of trustees, having merely an artificial existence, can only speak or act by the mouth or hands which the legislature has created for it. By the 6 Geo. 4, c. clxxxvii., s. 7, the chairman of the committee, who by that Act was to be a member of and chosen by the trustees, has the custody of the common seal of the trustees. The seal affixed by him to a deed would bind the trustees. At the present time the committee consists of twenty-four persons, twelve nominated by the council of the borough, and twelve chosen by the dock ratepayers: 14 & 15 Vict. c. lxiv. They have the management of the docks, subject to the veto of the trustees: 14 & 15 Vict. c. lxiv.; 6 Geo. 4, c. clxxxvii., s. 4. All the clauses which empower the committee to act for the trustees are part of the constitution of the corporation. If a corporation takes powers to be administered in a particular way, it is responsible for acts so done. A corporation is

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often liable for the acts of its head. It is bound by the acts of persons authorized to act for it under its common seal. Here, by the constitution of the corporation, the committee are its agents. The chairman of the committee has the custody of the common seal in order that he may when necessary, by affixing the seal, authenticate the acts of the committee as the acts of the trustees. The 6 Geo. 4, c. clxxxvii., had not the effect of altering the liability of the trustees. It provides that the committee shall execute the powers of the trustees. Throughout the acts of parliament, acts to be done under this provision by the committee are spoken of as the acts of the trustees. Thus, where the repairing of the docks is obstructed, the 7 & 8 Vict., c. lxxx., s. 135, gives to the trustees the power to cause vessels to be removed into any other of the docks, and the expence of removal is to be borne by the trustees (a). If the trustees are not responsible for the acts of the committee, no one would be so, because it is practically impossible to sue the committee for acts of nonfeasance. [Martin, B.—May not the committee be a corporation (b)?]

POLLOCK, C. B.—We are all of opinion that there must be judgment for the defendants. The trustees cannot in point of law be made responsible; they have no control over the proceedings of the committee. From the language of the Acts throughout, it appears that everything is to be done by the committee, and they are not the same persons as the defendants.

ALDERSON, B.—There are great difficulties in the case,

(a) See also 4 Vict. c. xxx., s. 124. *Bridewell Hospital*, 10 Rep. 31 b.; *Year Book*, 21 E. 4, 59 b. *Conservators of the River Tone v. Ash*,

(b) See *The Case of Sutton's Hospital*, 10 Rep. 30 a.; *Case of* 10 B. & C. 349.

but it is impossible to make the trustees liable for not doing an act which they have not the power to do. Upon appeal to them, they have some power to correct acts improperly done. The neglect complained of is the neglect to perform a duty which could only be done by the committee. But even if the trustees had been the persons appointed to do the act, according to the case of *Metcalfe v. Hetherington*, which governs this, they would not be liable to an action, because they have a discretionary power, the exercise of which cannot be controlled or questioned.

MARTIN, B.—There are great difficulties in the way of holding that the defendants are liable, but if that was the only point in the case, I should wish to consider the Acts with great care; for if the view we at present take on that point is correct, the plaintiff would probably be without remedy. But I think that this case is governed by that of *Metcalfe v. Hetherington*, and that the rule there laid down is one that ought to be discussed in a Court of error; and it may then be fully considered whether the defendants are liable for the acts of the committee.

WATSON, B., concurred.

Judgment for the defendants.

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No. 19. CLERK v. LAURIE, Public Officer of the UNION BANK OF LONDON.

T., a married woman, being entitled for her separate use to the dividends of certain government stock standing in the name of plaintiff as her trustee, the plaintiff gave to the defendants, a banking Company, a power of attorney to receive the dividends and at the same time directed them to pay the dividends to T. T. directed the defendants to pay the dividends to S. & B., bankers at Brussels, to whom she had pledged them for advances made by S. & B. to her husband. The defendants for some time paid the dividends to S. & B., but at length T. wrote to the defendants stating that in future she intended to receive the dividends herself. The defendants, notwithstanding this notice, received the ensuing half-yearly dividend, and transmitted it to S. & B. The plaintiff having sued the defendants for that dividend: *Held*, that the facts did not support a plea of payment to T., for being a married woman she was incapable at law of making a binding contract in respect of her separate property. *Sensible*, per Pollock, C. B., that the facts could not be pleaded by way of equitable defence, since a Court of law could not work out all the equities of the case.

the banking Company to the use of the plaintiff and George Maxwell, and for money received by the banking Company for the use of the plaintiff.

Pleas : to first count.—That they, the said Union Bank, paid the said dividends before this suit to Mrs. Tyrwhitt, to wit, by payment thereof to Messrs. Salter & Bigwood of Brussels, who were authorized by Mrs. Tyrwhitt to receive the same on her behalf.

To second count.—Never indebted, and payment.

Replications, joining issue on the pleas.

New assignment to the first plea.—That the plaintiff sues, not only for the non-payment of the dividends in the said plea mentioned, but also for that the banking Company omitted to pay to the said Mrs. Tyrwhitt, as mentioned in the declaration, the amount of other dividends upon the said stock, to wit, dividends which became due and payable upon the said stock in the month of October, 1855, which amount is part of the money received, as mentioned in the declaration, by the said banking Company by means of the said power.

Plea to new assignment.—That the Union Bank paid the dividend in the new assignment mentioned, before this suit, to the said Mrs. Tyrwhitt, to wit, by payment to Messrs. Salter & Bigwood, who were authorized by the said Mrs. Tyrwhitt to receive the same on her behalf.—Issue thereon.

At the trial before *Martin B.*, at the London sittings after last Michaelmas term, the following facts appeared.—The father of Mrs. Tyrwhitt had, by his will, left a certain amount of government stock to the plaintiff and one George Maxwell (since deceased), in trust, to pay the dividends to Mrs. Tyrwhitt, who was a married woman, for her separate use. In the year 1843, Mr. and Mrs. Tyrwhitt went to reside at Brussels, and the former opened an account with Messrs. Salter & Bigwood, who were bankers at Brussels.

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At the request of Mrs. Tyrwhitt, her trustees executed a power of attorney, enabling the defendants, the Union Bank of London, to receive the dividends. The trustees, at the time they forwarded the power of attorney to the defendants, requested them to pay the dividends to Mrs. Tyrwhitt. On the 1st July, 1853, Mrs. Tyrwhitt wrote to the defendants as follows:—

“ Brussels, 1st July, 1853.

“ Gentlemen,—I have to request you will place the amount of my next October dividend; 146*l.* 19*s.* 8*d.*, to the credit of Messrs. Salter & Bigwood, when received.

“ To the Manager of the	“ I am, &c.,
“ Union Bank of London.	“ J. M. Tyrwhitt.”

The defendants accordingly transmitted the dividend to Messrs. Salter & Bigwood, and they continued to transmit the subsequent dividends up to April, 1855, without any objection being made by Mrs. Tyrwhitt. In July, 1855, Mr. and Mrs. Tyrwhitt left Brussels. At that time Mr. Tyrwhitt was indebted to Messrs. Salter & Bigwood for money advanced. On the 5th October, 1855, Mrs. Tyrwhitt wrote to the defendants as follows:—

“ 10, Ely Place, Holborn, 5th October, 1855.

“ Sir,—I think it right to inform you that in consequence of the death of one of my trustees, as well as my having left Brussels, I have been obliged to have a new power of attorney made to receive my own dividends, and I shall not therefore have occasion to trouble you to do so.

“ To Mr. Scrimgeour,	“ I am, &c.
“ Union Bank.	“ Jane Maria Tyrwhitt.”

Notwithstanding this letter, the defendants received the dividend due on the 10th October, 1855, and transmitted it to Messrs. Salter & Bigwood. The present action was brought to recover the amount so received.

It was submitted, on behalf of the plaintiff, that under these circumstances there was no payment of the dividend

to Mrs. Tyrwhitt, as alleged in the pleas. It was contended, on behalf of the defendants, that this being an authority coupled with an interest, Mrs. Tyrwhitt had no power to revoke it. The learned Judge was of opinion that Mrs. Tyrwhitt, being a married woman, could not make a valid pledge of her property; and a verdict was found for the plaintiff for the amount claimed, leave being reserved to the defendants to move to enter a verdict for them.

Bovill, in the present term, obtained a rule nisi accordingly, on the ground that there was no revocation in law of the authority to the defendants to receive the money and pay it to Messrs. Salter & Bigwood.

J. B. Karslake shewed cause (Nov. 18).—The defendants have failed to prove a payment of the dividend to Mrs. Tyrwhitt. The trustees, who were the legal owners of the dividends, authorized the defendants to pay them to Mrs. Tyrwhitt. She directed the defendants to pay the dividends to Salter & Bigwood; but by the letter of the 5th October, 1855, she gives the defendants distinct notice that they are no longer to receive them. That operated as a revocation of their authority to pay the dividends to Salter & Bigwood. The defendants, however, set up against the plaintiff, who is the legal owner, the *jus tertii*, and say that they have paid this dividend, not to Mrs. Tyrwhitt, but to Salter & Bigwood, whose authority to receive it has been revoked. Mrs. Tyrwhitt, being a married woman, was incapable of making a valid contract so as to pledge her separate property for her husband's debts. The defendants have undertaken to prove that they paid the dividend to Mrs. Tyrwhitt; and in order to do so, they must shew a valid irrevocable authority on her part. This is not like the case of *Gaussin v. Morton* (a), where A.,

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being indebted to B., in order to discharge the debt, executed to B. a power of attorney, authorizing him to sell certain lands; and it was held, that this being an authority coupled with an interest, could not be revoked (a). Here there was no valid authority from a person competent to contract. Moreover, the plaintiff might revoke the power of attorney at any time.

*Lush*, in support of the rule.—These dividends being the separate property of Mrs. Tyrwhitt, she, in conjunction with her husband, pledged them to Salter & Bigwood, and the defendants received the dividends as their agents. A married woman has the same power of dealing with her separate property as a feme sole; and the plaintiff directed that the dividends should be at the disposal of Mrs. Tyrwhitt. [Bramwell, B.—The plaintiff never gave her the power to make an irrevocable disposition of them.] It is not the trustee who revokes the power. [Alderson, B.—The authority given by the plaintiff to the defendants was to receive the dividends and pay them to Mrs. Tyrwhitt. Suppose the plaintiff had directed the defendants to pay the dividends into the hands of Mrs. Tyrwhitt, and they had undertaken to do so, could they discharge themselves unless they proved that they had paid them into her hands?] Mrs. Tyrwhitt being capable of making a contract binding her in equity, it is as much irrevocable as a contract at law. [Martin, B.—The defendant must prove a contract binding in a court of law. Suppose the plaintiff went to the bank and said “There is a sum of money which I direct you to pay to Mrs. Tyrwhitt,” could they discharge themselves by shewing that they paid, not to Mrs. Tyrwhitt but to Salter & Bigwood? Pollock, C. B.—As against the plaintiff might not the bank say, “You told us

(a) See also *Smart v. Sandars*, 5 C. B. 895, 917, note; *Yates v. Hoppe*, 9 C. B. 541.

to pay to Mrs. Tyrwhitt, and she has given us a direction as to payment which she cannot revoke.] The plaintiff in effect authorized the bank to pay the dividends, according to the directions of Mrs. Tyrwhitt if she gave any, if not, to herself.

The Court having intimated their intention to consider their judgment,

*Lush* applied for leave (in the event of the judgment being adverse to the defendants) to plead the facts by way of equitable defence.

*Cur. adv. vult.*

POLLOCK, C. B. now said.—We are of opinion that the rule ought to be discharged. I was desirous of taking such a view of the subject as the justice of the case obviously requires; for it is a great hardship on the parties who have lent their money on the security of the separate property of a married woman, that she should break her engagement and say that she was incapable of being bound. We are unable, however, to adopt that view of the subject. It seems to us that the correct view is this:—The plaintiff gave to the defendants an authority to pay the dividends to Mrs. Tyrwhitt. He gave them no authority to pay them to persons with whom she might contract debts, and when the plaintiff comes into a Court of law and claims the dividends, which he has a right to do if they have not been disposed of according to his directions, it is no answer to say that Mrs. Tyrwhitt has acted with a want of honesty and correctness of conduct. The plaintiff is pursuing his duty as a trustee in demanding the money, and he has a right to recover it; therefore the defence fails, and the rule for a new trial must be discharged.

Mr. *Lush* proposed, that in the event of our judgment being adverse to the defendants, he should be at liberty to

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move for leave to plead the facts by way of equitable defence. We think it better to say that, of course, we could not grant the application except on affidavits, and if, as is very likely, it should turn out that the will contains a clause forbidding anticipation of the dividends, the equitable defence would be of no avail. It seems to me, however, that there is another and a larger ground on which such a plea cannot be pleaded. It is now an established rule, and indeed it is essential to the carrying into effect the provisions of the statute which allows equitable defences, that no such defence shall be permitted except where the judgment upon it will carry out all the equities belonging to the matter to which the plea refers. For instance, if a person is sued on a bond or covenant under seal, and the performance has been dispensed with by an instrument not under seal, or by some other matter, so that a Court of equity would grant an absolute and unconditional injunction, facts may now be pleaded which formerly would have been no defence at law. But there the judgment of the Court works out the whole equity so as to do complete justice between the parties; that would not be so here, for if the proposed equitable defence were pleaded in answer to the claim of the plaintiff, there might still be a question whether the plaintiff, as trustee, might not be liable to his cestui que trust, and we have no means of protecting him against such a proceeding. It appears to me, therefore, that this matter can only be entertained by a Court which can bring all the parties before it, so that the whole equity may be worked out.

BRAMWELL, B.—I will only say, that, with respect to pleading the equitable defence, I have not considered the matter, and therefore give no opinion upon it.

Rule discharged.

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## HUNTER v. GIBBONS.

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**B**OVILLE had obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to deliver an equitable replication in addition to other replications already allowed.—The first count of the declaration was in trespass for making excavations under the plaintiff's land, and taking away and converting coal and ironstone. The second count was by the plaintiff as reversioner, for making excavations under land in the possession of Phœbe Bradley, a tenant for life, and taking away coal and ironstone. The third count alleged, that Phœbe Bradley was seised of certain lands for life, without impeachment of waste, the reversion thereof belonging to the plaintiff; that mines and minerals lay under and supported the said lands; that Phœbe Bradley, by deed, leased the mines to the defendant for twenty-one years, if Phœbe Bradley should so long live; and that the defendants during the time entered &c., and dug out coal, &c., which supported the said lands, and so negligently worked it that he thereby deprived the superjacent lands of support, &c.

To these counts the defendant pleaded the Statute of Limitations.

The plaintiff proposed to plead in answer the following equitable replication—That the trespasses in the first count, were the breaking and entering of certain mines, &c., underground and out of sight, and not then opened and in work, in a secret and clandestine manner and without the knowledge of the plaintiff, the defendant using, for the purpose of committing such trespasses, pits, &c., of him the

To a plea of the Statute of Limitations, in an action of trespass or trespass on the case, the plaintiff will not be allowed to reply as an equitable answer, under s. 85 of the Common Law Procedure Act, 1854, that the trespasses, &c., were underground, and had been fraudulently concealed from the plaintiff till within six years before suit.

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defendant, near to and communicating with the said mines, &c., of the plaintiff; and that the said conversion, &c., was a secret and clandestine taking, appropriation, and conversion by the defendant, without the knowledge of the plaintiff, of certain coal and ironstone before then secretly, &c., and wrongfully gotten and dug by the defendant from the said mines, &c., underground and out of sight, by means of pits, &c., of the defendant, and brought to the surface by and through pits, &c., of the defendant: and that the grievances in the second count are injurious to the reversion, &c., by means of such secret and clandestine breaking, &c., of the mines, &c., underground and out of sight, &c., during the lifetime of the tenant for life: and that the grievances in the third count are injurious to the reversion, &c., by the negligent working by the defendant of the mines and minerals under the said land, which had been leased by Phœbe Bradley, who at the time, &c., was seized in her demesne as of freehold of the said lands, mines, &c., and that the defendant worked the said mines underground, &c., by means of workings from pits, &c., of the defendant, near to and communicating with the said mines so leased; and that it was then, and at all times thereafter, down to a period within six years before this suit, impossible for the plaintiff to know or ascertain the manner in which such workings had been conducted, or the fact of such negligence: And the plaintiff says that during all the time of such trespasses, and at all times thereafter, down to a period within six years next before this suit, the defendant fraudulently concealed from the plaintiff the fact of such trespasses and injuries being committed, and of the improper and negligent mode of working; and for the purpose of concealing such fact refused to permit the plaintiff the means of inspecting and examining the workings of the said other mines of the

defendant, near the mines so leased to the defendant as aforesaid, and thereby ascertaining by means of the pits or shafts of the defendant, whether the plaintiff had been injured as in the declaration mentioned. And that until a period within six years next before the commencement of this suit, there were no means of discovering or ascertaining the getting, appropriation, and conversion of the said coals, or the fact of such trespasses as aforesaid having been committed; and that by reason of such clandestine working, and fraudulent concealment by the defendant as aforesaid, the plaintiff did not in fact know that the said coal and ironstone had been so gotten, appropriated and converted, or the said trespasses and injuries committed by the defendant, or of the said negligent and improper working; and that the same respectively became known to the plaintiff at a time within six years next before the commencement of this suit.

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Keating and *Fischer* now shewed cause.—This replication cannot be allowed. The effect of it, if good, would be to repeal the Statute of Limitations. The plea does not set up an inequitable, but a statutable defence. Such an answer as the present has never been allowed to prevail in equity. There is no case where the Courts have interfered to prevent a defendant from pleading the legal defence under the statute. In fact, a defendant is never restrained from pleading a legal defence to a legal demand, unless by reason of some contract or previous equitable relation between the parties. *Blennerhassett v. Day* (a) may be cited as an authority to the contrary. In that case the object of the bill was to redeem a mortgage: the term had been mortgaged to the landlord, the legal estate was vested in a trustee to receive the mortgage money, and the

(a) 2 Ball & Beatty, 104. See pp. 129, 130, 137.

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Court refused to allow it to be set up, in answer to an ejectment to try the question whether the term had been forfeited, so as to deprive the representative of the mortgagee of the right to redeem, and at the same time the Court prevented the Statutes of Limitations from being set up, on the ground of an equitable relation subsisting between the parties. Upon all legal titles and legal demands courts of equity are bound by the Statute of Limitations; *Hovenden v. Lord Annesley* (*a*). The jurisdiction to give damages does not ordinarily attach in equity except as ancillary to some other relief: Story's Equity Jurisprudence, s. 799 (*b*), *Clifford v. Brooke* (*c*). Where the party has a colourable right, which he has exceeded, an account may be granted, though the jurisdiction is founded on a trespass: *Thomas v. Oakley* (*d*). In the case of a mere trespass it is probable that the Court of Chancery would not interfere at all. The Court might entertain a suit on the ground of fraud, because fraud gives a concurrent jurisdiction: *Booth v. Lord Warrington* (*e*), Spence on the Jurisdiction of the Court of Chancery, vol. 2, p. 62. Whether it would do so in a case like the present is an open question. Such a suit would not be barred by length of time, but that is because the Statute of Limitations does not apply to suits in equity.

Bovill and *Phipson*, in support of the rule.—The question now before the Court is, not whether the replication is good, but whether the plaintiff shall be at liberty to raise this point. The replication is admissible upon the same

(*a*) 2 Sch. & Lef. 631.

(*c*) 18 Vesey, 131.

(*b*) Except upon very peculiar equities as in cases of fraud. See Ib.

(*d*) 18 Vesey, 184.

(*e*) 4 Bro. P. C. 164.

principles as the replication in *Wood v. Dwarris* (*a*). The case of *Blennerhassett v. Day* (*b*) shews that in some cases courts of equity will interfere to prevent the statute from being pleaded. In cases of fraud, courts of equity have entertained demands which might have been enforced at law, where the remedy at law was barred by the Statute of Limitations, because there was no proceeding at law by which the effect of the statute could have been avoided; *Blair v. Bromley* (*c*). That case shews that the plaintiff ought not to be precluded from raising the point by a replication on equitable grounds. *Charter v. Trevelyan* (*d*) is to the same effect. *The Imperial Gas Company v. The London Gas Company* (*e*) is the only direct authority that fraud is no answer to the plea of the statute. There are many dicta to the contrary. In *Bree v. Holbech* (*f*) Lord Mansfield says that there are many cases which fraud will take out of the Statute of Limitations. In *Clark v. Hougham* (*g*) Best, J., expresses a similar opinion. *Ex parte Bolton* (*h*) is a decision to the same effect. [*Pollock*, C. B.—I cannot think that a Court of equity would refuse to allow the defence to be set up; the relief in equity would be different from what the plaintiff would get here. The statute has made no provision for an equitable declaration (*i*), and this replication will not administer the whole equity between the parties.] As to the objection that a Court of equity will not interfere to prevent a defendant from pleading a legal defence to a legal claim, there is no case in which a plaintiff would seek to

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(*a*) 11 Exch. 493.(*e*) 10 Exch. 39.(*b*) 2 Ball & Beatty, 104.(*f*) 2 Doug. 654.See also *Pinche v. Thornycroft*,(*g*) 2 B. & C. 153.

1 Bro. C. C. 289; 4 Bro. P. C.

(*h*) 1 Mont. & Ayr. 60.

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(*i*) See *Gulliver v. Gulliver*,(*c*) 5 Hare, 542. See 2 Ph. 354.

ante, p. 175.

(*d*) 11 Cl. & F. 714.

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reply equitably except in answer to a plea good at law. The nature of the relief is not the test under the 85th section as it is under the 83rd; the plaintiff, under the 85th section, may reply such facts as avoid the plea on equitable grounds. In cases of fraud, it is held in Courts of equity, that the statute runs from the time of the discovery of the fraud. *Whalley v. Whalley* (*a*); *South Sea Company v. Wymondsell* (*b*). This replication does avoid the plea on equitable grounds. If the Court does not assent to that proposition the replication ought, nevertheless, to be allowed, in order that the plaintiff may have an opportunity of obtaining the opinion of a Court of error upon the point.

POLLOCK, C. B.—I am of opinion that the rule must be discharged. It would be highly mischievous, and would open the door to a flood of litigation if we decided that this replication could be pleaded. If such had been the meaning of the legislature, we should have been bound to obey. But no case has decided that fraud is an answer to every matter that may be set up as a defence. The plaintiff must go into equity and obtain redress, which that Court ought to give him if his contention here is well founded. The plaintiff complains of a trespass to his land. The defendant answers, that the act was done so long ago that it cannot be called in question in a Court of law. To that the plaintiff purposed to reply fraud. The plaintiff's counsel cited one authority to shew that where there has been a fraud the statute cannot be set up. If that were so, if a man could reply to a plea of the statute that his debtor had prevented him from suing by fraud, the equitable replication would be as common as the promises of payment which people used to prove before Lord Tenterden's Act. Mr. *Bovill* asked us to allow the repli-

(*a*) 3 Bligh, 1.

(*b*) 3 P. Wms. 143.

cation that a Court of error might decide the question of its validity at once. But the defendant would deny the truth of the replication, and say that what was done was a mistake. No sort of litigation would be likely to be more lasting or expensive than a question whether, fifteen years ago, a man took his neighbour's coal by mistake or fraud. I rest my decision on the ground that a Court of equity would not prevent a defendant from setting up this defence under the statute. I therefore think we ought not to treat this as a valid replication, or allow it to be pleaded.

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ALDERSON, B.—I am of the same opinion. The statute 21 Jac. 1, c. 16, s. 3, says, that no action, &c., shall be brought, except within a time therein expressed and not after, viz., actions on the case and of trespass within six years. The terms of the enactment are absolute; and there is no provision for the case where a person is prevented from suing by fraud. Such being the plain meaning of the words, the plaintiff now calls upon us to say, that notwithstanding the statute a person may maintain an action, if prevented by fraud from suing. But it is for the legislature, not for us, to say that. There is no distinction between trespasses underground and upon the surface. I am not prepared to say, that the Court might not interfere in cases of trust or of bad faith, or that it might not, under certain circumstances, prohibit the pleading of the Statute of Limitations. Courts of equity have been in the habit sometimes of prohibiting the setting up of inequitable defences; thus, they will prevent outstanding terms from being set up where the owner of the term is a trustee for the plaintiff. At law, the Judge was always obliged to allow the defence; but that difficulty is now removed in cases where a Court of equity would not allow the defence to be set up. But I do not know that

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that Court ever has interfered to prevent the pleading of the Statute of Limitations. The plaintiff must seek relief in a Court of equity.

BRAMWELL, B.—I am of the same opinion. The statute does not give to the plaintiff an absolute right to reply equitably. The Court must see, that there is some chance that the facts sought to be replied would avoid the plea on equitable grounds. I doubt whether a Court of equity would prevent the Statute of Limitations from being pleaded in a case like the present. But for the statute, that Court would not entertain the jurisdiction. In *Blair v. Bromley* (*a*), the Vice Chancellor said, that a reason for the existence of the jurisdiction was, that there was no remedy at law. In *Blennerhassett v. Day* (*b*), the object of the bill was not to restrain the defendant at law. It is said on the other side, that no bill lies to restrain a defendant from pleading a legal answer to a legal demand. There must then be some other equity. The Court might entertain a suit for an account, but in that suit the sum to which the plaintiff would be entitled, is not that which he would get in an action of trespass. In equity, the plaintiff would be entitled to the value of the coal, less the cost of getting it; at law, he would be entitled to its value at the mouth of the pit, without deduction. If then this replication was allowed, it would alter the rights of the parties. Again, I doubt whether, under this section, an equitable replication can be allowed to sustain an equitable claim. If a plaintiff brings an action, to which there is a good defence, but there are matters shewing that he has a good equitable claim, why should he not go to a Court of equity in the first instance? In *Wood v. Dwarris* (*c*), the question was not whether the

(*a*) 5 Hare, 542.

(*b*) 2 Ball & Beatty, 104.

(*c*) 11 Exch. 498.

replication ought to have been allowed. The allowance of an equitable replication is a matter of discretion; if it leads to an inquiry improper to be submitted to a jury, that is a reason for disallowing it. The present case is one where a jury would be likely to be prejudiced. On all these grounds I am of opinion, that this rule ought to be discharged.

WATSON, B.—I agree with the rest of the Court. The 85th section empowers the plaintiff to reply "facts which avoid the plea upon equitable grounds." The plaintiff must, therefore, shew clearly what the equity is, and such facts as will support the equitable answer. I want to see some authority to shew, that if there is fraudulent concealment of trespasses, the plaintiff has an equity to prevent the statute from being set up; but it appears to me, that as the action is for damages, a Court of equity would not interfere. This Court is bound to see, that there is an equity before they allow the replication. It is a good ground for discharging the rule, that this is an action brought to recover damages, and that there is a right by law to set up the defence.

Rule discharged with costs.

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Nov. 21.

HENRY BRAY, Administrator of JAMES BRAY, v. FINCH.

The Court will not, under the 50th section of the Common Law Procedure Act, 1854, order a defendant "to answer on affidavit what documents he has in his possession or power relating to the matters in dispute, and whether he objects, and on what grounds, to the production of such as are in his possession," where the defendant has furnished the plaintiff with an abstract of an account, and informed him that it was taken from a particular book which contained all the entries relating to the matters in dispute between them.

Per Bramwell, B., it is necessary in order to obtain a rule under this section, that the applicant should shew the existence of the document, the production of which is sought for.

**H.** *BULLAR* had obtained a rule, calling on the defendant to shew cause why he should not answer on affidavit, stating what documents he has in his possession, custody, or power relating to the matters in dispute, or what he knows as to the custody of them, or any of them, and whether he objects, and on what grounds, to the production of such as are in his possession or power.

The plaintiff in his affidavit (sworn May 22) stated, that the action was brought by him as administrator of J. Bray, to recover 320*l.* for wages, money lent, and interest due from the defendant to the deceased, and for damages for wrongfully refusing to render an account to the plaintiff as administrator: that the intestate lived in the service of the defendant for fifteen years, receiving wages at the rate of 20*l.* a-year, the arrears of which, together with other monies, he left in the hands of the defendant at interest: that the plaintiff believed that the balance due amounted to a larger sum than 122*l.*: that the intestate died in June 1853; and in November 1853, the plaintiff's solicitor requested the defendant to furnish him with an account: that the defendant neglected to render any account to the plaintiff until April 1856; but since the commencement of the action, the defendant rendered an account, in which he debited himself with the sum of 174*l.* 3*s.* 7*d.* as due from him, and credited himself with certain amounts on the other side of the account. The plaintiff also stated that he believed that the defendant, in his business, kept books of account, cash books, ledgers, and other books, papers, and documents, as men in business usually do, relating to their servants' wages, and other

money matters and business, and that he had done so during the fifteen years while the deceased was in his service; and that for the reasons aforesaid, as well as for other reasons he had good cause to suspect and believe that the same books of account, cash books, ledgers, and other books, papers, and documents, were in the possession of, or power of the defendant, and contained entries relating to the matters in dispute in this action, shewing that the defendant, at the time of the death of the intestate, was indebted to him, and still is indebted to the plaintiff as administrator, in a much larger sum than 122*l.*, which the defendant then admitted to be due: that he had been advised, that for the purpose of prosecuting the action with effect, and in order to ascertain the amount due, it was necessary to inspect the said books, &c., or so much of them as related to the account; and that such books, &c., would be material evidence, and enable him to establish his claim against the defendant.

The defendant in his affidavit stated, that according to the best of his knowledge, information, and belief, he had not then, and never had in his possession, &c., any account books, books of account, &c., relating to the matters in question, other than a certain general book of account, &c., produced, &c., together with a certain memorandum on a separate piece of paper attached to the said book. The defendant's attorney swore, that a statement of account, a copy of which was annexed to his affidavit, was, on the 6th of May last, produced by him, and handed to the attorney of the plaintiff for his perusal, and was afterwards returned by him: that at the time of producing the statement of account, he told the plaintiff's attorney, that it contained a true abstract of all monies mentioned in the said book of account, as due and owing to the plaintiff as administrator, from the defendant, which, to the best of his knowledge it did; and that to the best of his knowledge, &c., the said

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book of account was the only document in the possession, &c., of himself or the defendant, containing any account, &c., relating to the matters in dispute in this cause.

H. J. Hodgson now shewed cause.—The applicant does not state that the documents of which he seeks to enforce the production are in existence. It is not enough to say that he has reason to suspect and believe that the defendant has books of account: it is necessary to shew that the documents exist before an order can be made for their production. The defendant admits that there is one book of account from which the plaintiff has had extracts, but the plaintiff does not ask simply to inspect that.

H. Bullar, in support of his rule.—The plaintiff, being an administrator, has no means of knowing the particulars of the dealings between the intestate and the defendant, or those relating to the books of account in which the transactions between the intestate and the defendant were entered. If this affidavit is insufficient no conscientious man could obtain an order for the production of documents under such circumstances. In *Forshaw v. Lewis* (*a*) an application under this section was granted, though the affidavits were not stronger than those in the present case. [*Bramwell*, B.—Why did the plaintiff not administer interrogatories? In proceeding under the 50th section it is necessary that a sufficient affidavit, shewing the existence of the document, should be produced. *Alderson*, B.—The practice in Chancery is for the plaintiff to file a bill against the defendant, and, upon the answer, to move for the production of documents admitted by the answer to be in the possession or power of the defendant (*b*).] The defendant

(*a*) 10 Exch. 712. *Noble*, 1 Jac. & W. 227; *Rennell*

(*b*) See *Daniell's Chancery Practice*, 1661, 1663. *Barnett v. Sprye*, 1 De Gex McN. & G. 656.

is bound to render an account, and to produce the memoranda relating to the accounts of the money transactions between himself and the deceased; *Freeman v. Fairlie* (a). [Alderson, B.—That is not disputed: the question is whether this application is proper, the plaintiff having had an abstract of the account, and not having asked to see the book from which it was taken. If the rule had been simply for an order for the inspection of that book, it might have been made absolute.]

POLLOCK, C. B.—This rule must be discharged. The plaintiff calls on the defendant to shew cause why he should not answer on affidavit stating what documents he has in his possession or power relating to the matters in dispute, and whether he objects, and on what grounds, to the production of such of them as are in his possession or power. Now that the whole matter is before the Court, it appears that the defendant has furnished the plaintiff with an abstract of an account giving all the information that he can. If, on application, the defendant had refused to allow the plaintiff to see the book from which that account was made out, the plaintiff might have come here to compel the defendant to produce the book; but he only asks for an answer which, in reality, has already been given to him, and he has no right to put the defendant to such unnecessary expense.

ALDERSON, B.—I am of the same opinion. The defendant had one book in which the accounts between himself and the intestate were entered. In May, 1856, an abstract of the account contained in that book was handed by the defendant's attorney to the plaintiff's attorney, and left with him. The plaintiff's attorney was then told that it was the only document which contained any entries relating to

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the matters in dispute. The plaintiff made no application to be permitted to see the book.

BRAMWELL, B.—I also think that this rule must be discharged. The plaintiff is not at liberty to call on the other party to answer on affidavit, when it is obvious that he would gain no benefit, and when he already knows the answer which he would get. The object of the 50th section was not to enable a person to apply for the production of documents on the ground that it is probable that the other party possesses something; on the contrary, it provided that the applicant should state his belief "that some one or more particular documents, to the production of which he is entitled, are in the possession of the other party." It is said that the plaintiff is an administrator, and does not know what the documents are, but the legislature has made it a condition precedent that the affidavit should shew the existence of the documents.

WATSON, B.—I am of the same opinion. I am not disposed to say what particularity is necessary in the affidavits of the applicant; but upon the other ground I concur with the rest of the Court. I do not think that this application was made in good faith; the plaintiff's attorney saw the account on the 6th of May, but the plaintiff, in his affidavit sworn on the 22nd, does not state anything about the interview when the account was produced.

Rule discharged, with costs.

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Nov. 17.

KENT v. THOMAS.

THIS was an action of covenant on a mortgage deed, dated August 19, 1845, for the payment of 4000*l.*, and interest. The defendant pleaded as to 2000*l.* payment, and as to the interest, except 106*l.*, payment. Issues were joined on these pleas.

The case having come on for trial, it was agreed that a verdict should be taken for the plaintiff, subject to a special case, which was in substance as follows:—

The defendant had borrowed 4000*l.* of the plaintiff, through the agency of one Porter, who prepared the mortgage deed, and was the only attorney employed. The defendant was in the habit of paying interest regularly to Porter. The plaintiff had been in the habit of receiving the interest from Porter at his office. For some time he received it with tolerable regularity, and when it fell into arrear he applied to Porter, who made various excuses, such as, that the defendant was absent from England, and the like. Porter was the solicitor of the plaintiff and his family, and had been executor under his father's will: he owed the plaintiff about 7000*l.* on various accounts. The plaintiff had never given him any authority to receive any part of the principal money. The defendant had formerly been a solicitor; Porter was then his clerk.

maining due; that led to an explanation and the discovery of the fraudulent receipt of the principal by P. The mortgagee did not repudiate the payment at the time. On 24th of February, the mortgagor wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that P. would not be able to make good his defalcations to the mortgagee. On the 26th the mortgagee wrote requesting payment by check; and on the 4th of March the mortgagee again wrote, saying that he believed that P. was hopelessly involved, and suggesting that the loss should be divided between them.

Held, that P. was the agent of the mortgagee to receive the interest but not the principal; and that in order to bind the mortgagee by the acts of P. in receiving the principal, it was necessary to shew either that what he did was with the intention of adopting the acts of P. or that the position of the mortgagor was altered.

P., a solicitor employed both by a mortgagor and mortgagee, received the interest on the mortgage debt regularly. After a time he fraudulently obtained from the mortgagor a portion of the principal. At first the mortgagee received his interest regularly from P. at his office; but ultimately P. allowed the interest to fall into arrear till a large sum became due to the mortgagee. During this time the mortgagee made no application to the mortgagor in consequence of the irregularity in payment. In September 1853, the mortgagor paid the mortgagee 43*l.* 13*s.* 9*d.*, as a half year's interest on the principal re-

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In 1849 and 1850, in consequence of an application from Porter for payment, the defendant paid him various sums on account of the principal money due, amounting to 2000*l.*

On the 16th of July the plaintiff wrote to the defendant:—"I beg to inform you that there is now due for arrears of interest on the mortgage 762*l.* 16*s.* up to the 24th of February last. I have to request immediate payment. And I hereby give you notice, that unless it is paid before the 24th, on which day a further sum of 87*l.* 7*s.* 6*d.* will become due, I shall take such measures as I shall be advised, to compel payment, &c. I intimated to solicitor Mr. Porter, that I should require the principal to be repaid. I don't know whether he has sent you notice thereof."

The defendant, in answer, wrote:—"July 19. I never was more surprised in my life, &c. So far from owing you 762*l.* 16*s.* for interest I do not owe you one farthing. The interest has been regularly paid to Mr. Porter every half-year, &c. Mr. Porter has never given me any intimation of your wish to receive the principal," &c.

The plaintiff, in reply:—"Aug. 2. I cannot but express my surprise and annoyance at the contents of your letter. I have hitherto looked upon Mr. Porter as worthy of the most implicit confidence, &c. He has repeatedly informed me that he had not had any communication from you for a long time. I understand that he was acting for both parties in the business between us. Am I correct? I must request that you will not in future make any payment to him on my account, &c. He must, I fear, have appropriated to his own use the 762*l.* I have sent him a copy of your letter," &c.

The defendant to the plaintiff:—"Aug. 6. I always understood Porter was acting for you as well as for me, which was why I paid him the money. I will pay you the half-year's interest due the 24th instant, as you may direct."

On the 15th of September the plaintiff wrote to the defendant, requesting payment of interest. The defendant remitted 43*l.* 13*s.* 9*d.* On the 20th of September the plaintiff wrote to request an explanation, wishing to know whether Porter had deceived him, and only lent the defendant 2000*l.*, and stating that Porter had the deed. On the 21st the defendant wrote to the plaintiff:—"The 43*l.* 13*s.* 9*d.* was for half a year's interest, due the 24th ultimo, for 2000*l.* only, I having paid off 2000*l.*, &c. It is most grievous to find you have been so deceived," &c.

On the 24th of February the defendant wrote, "In what way shall I pay the half-year's interest just due to you, &c. I fear that Mr. Porter is not likely to be in a position to make good his defalcations to you."

On the 26th of February the plaintiff wrote:—"If you employ a London banker the safest way will be a check, payable to me or order," &c.

On the 4th March plaintiff to defendant:—"With regard to the affair between us of the mortgage, in which Porter appears to have acted for both, and I am afraid will turn out to have deceived both, I should regret very much if any thing I say raises an idea of my wishing to take advantage of any thing that has occurred, but wish to suggest to you the propriety, or at least prudence, of taking an early opportunity of stating the whole affair to your legal adviser, and learning his opinion as to whether it is an equitable arrangement for the whole loss to fall upon one party only. I must beg of you to dismiss from your thoughts any idea of a hostile or offensive nature in what I have here said. I find it extremely difficult to express the subject with sufficient clearness, and yet at the same time avoid any uncourteous phrase."

It was agreed that the Court were to draw any inferences of fact which a jury might have done.

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The question for the opinion of the Court is, whether, under the circumstances above mentioned, the defendant has established his first and second pleas of payment, or either of them. If the defendant has done so, a verdict is to be entered for him; if not, the verdict for the plaintiff is to stand for such sum as the Court shall direct.

Bovill (with whom was *Kaye*), for the defendant.—The plaintiff adopted the acts of Porter. As to the interest: the plaintiff had always received the interest through Porter; and when he was told, in the letter of the 19th of July, that all interest had been regularly paid to Porter, he did not in any way disavow Porter's acts as his agent. It cannot be contended, since the case of *Wilkinson v. Candlish* (a), that an authority to a solicitor to receive the interest due on a mortgage is an authority to receive the principal; but here there was no repudiation of the acts of Porter by the plaintiff. On the 15th of September the plaintiff writes to request payment of half a year's interest, and having been told by the letter of the 27th of September what the facts were, he does not repudiate what had been done by Porter, but looks for a remedy to him, and accepts 43*l* 13*s*. 9*d*. as the half-year's interest due from the defendant. This amounted to an adoption of the acts of Porter. The letters of the 24th and 26th of February again shew an assent to receive interest upon the footing that 2000*l*. only remained due. [Alderson, B.—The plaintiff in the letter of the 20th of September asks whether Porter only lent 2000*l*. There was no authority in fact to Porter to receive the principal, and the position of the defendant does not seem to have been altered by any thing said or done by the plaintiff. Pollock, C. B.—The defendant must shew that there was some change of circumstances

(a) 5 Exch. 91.

affecting him. In *Coles v. The Bank of England* (a) it was held that the Bank had a defence, because their position was altered by the plaintiff having received interest on the sum which actually stood in their books.] If the defendant had been told at once that the loss must fall on him, he might have taken steps against Porter. [Alderson, B.—The doctrine laid down in *Coles v. The Bank of England* was qualified in *Freeman v. Cooke* (b).] If a man does an act as agent for another without authority, and the other assents to, or adopts or confirms the act so done, he is liable. There is a sufficient adoption by the assent of the plaintiff to the payment of interest on 2000*l.* [Pollock, C. B.—There is no evidence of adoption to satisfy me. The question is whether the plaintiff did any of the acts relied upon with the intention of adopting the act of Porter. I think that there is no evidence of such intention. If the defendant could put the case on another footing, and shew that he was placed in a worse position by the acts of plaintiff, the case might be different. Alderson, B.—The payment was made after the letter of the 20th September.]

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Montagu Chambers (with whom *Dowdeswell*) appeared for the plaintiff, but were only called on to argue as to the first point.

ALDERSON, B.—The interest was not regularly paid to the plaintiff, and no complaint was made by him to the defendant. That shews that the plaintiff treated Porter as his own agent to receive the interest. As to the principal, it is clear that the plaintiff never gave Porter authority to do more than receive the interest. Porter took upon himself to receive the principal, and the defendant, who trusted him, is the person who must suffer.

(a) 10 A. & E. 437.

(b) 2 Exch. 654.

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WATSON, B.—When a solicitor is employed by two parties he is often agent to pay as well as to receive. In this case he was the agent of the plaintiff to receive the interest; but as to the principal, *Parke B.*, in *Wilkinson v. Candlish* (a), pointed out that an authority to receive the interest on a mortgage by no means imports an authority to receive the principal.

Verdict to be entered for the plaintiff on the first plea, and for the defendant on the second.

(a) 5 Exch. 91.

Nov. 7.

## HEATH v. HEAPE.

By 5 Geo. 4, c. 83, s. 4, every person running away and leaving his wife or his or her child or children chargeable, or whereby she, &c., shall become chargeable to any parish, &c., shall be deemed a rogue and vagabond, and punishable as such. *Held*, that a man leaving his wife cannot be treated as a rogue, unless the wife has become actually chargeable.

ACTION for falsely, maliciously, and without reasonable or probable cause, charging and accusing the plaintiff, before a justice of the peace, with unlawfully running away, and leaving his wife and two children chargeable to the township of Swadlingcote, and upon such charge procuring the justice to grant a warrant for the apprehension of the plaintiff, &c., and causing the plaintiff to be arrested under the said warrant. Plea.—Not guilty.

At the trial before *Alderson*, B., at the last assizes for the county of Stafford, it appeared that the plaintiff, a working potter, not earning enough to enable him to maintain his wife and family, left them and went in search of work to Liverpool, and afterwards took his passage to America. The defendant, the brother of the plaintiff's wife, on the 29th of June, received a letter informing him of the plaintiff's intention. He went to one of the overseers, and asked him what was to be done, telling him that the plaintiff's family would become chargeable to the parish. The overseer referred him to Mr. Thornehill, the clerk to the magis-

trates at Burton-on-Trent. The defendant went to Mr. Thornewill, and finally laid an information on oath before a magistrate, that the plaintiff had unlawfully run away, leaving his wife and family chargeable to the township. This was untrue, the plaintiff having provided his wife with a small sum of money. A warrant was then made out, and the defendant and the constable proceeded to Liverpool, and arrested the plaintiff on the 30th. On the 2nd of July, the defendant went with the plaintiff's wife to one of the overseers, told him the whole affair, and obtained 2*s.* 6*d.* as relief for the plaintiff's wife. The plaintiff was brought before the magistrates on the 3rd of July, and discharged.

The learned Judge ruled, that there was no reasonable or probable cause for making the charge, reserving leave to the defendant to move to enter a nonsuit, if the Court should think that actual chargeability was not necessary to constitute the offence. On the question of malice, he told the jury that if what was done was a pure mistake on the part of the defendant, that would be no malice; but that the attempt to support the case by the contrivance resorted to after the arrest, was evidence of malice. The jury found a verdict for the plaintiff.

*Huddleston* now moved for a rule to enter a nonsuit in pursuance of such leave; or for a new trial on the ground of misdirection.—By the 5 Geo. 4, c. 83, s. 4, “every person running away and leaving his wife, or his or her child or children chargeable, or whereby she or they, or any of them shall become chargeable to any parish, township, or place,” shall be deemed a rogue and vagabond, &c. The offence is the running away; if the natural consequence of so doing is, that the wife must become chargeable, it is enough. [Alderson, B.—By the 3 Geo. 4, c. 40, s. 2, all persons who threatened to run away and leave their wives or

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children chargeable, &c., were to be deemed idle and disorderly persons; but that was altered by the Act now under consideration.]—Secondly, there was no evidence of malice.

POLLOCK, C. B.—There will be no rule. The questions are, first, whether the plaintiff was a rogue and vagabond; and upon that point I agree with my brother *Alderson*, and think that his ruling at the trial as to the construction of the Act was correct. If a man goes away, leaving his family, until they become chargeable he is not a rogue and vagabond. Then as to the question of malice, the conduct of the defendant in colluding with the overseer and obtaining from him relief for the plaintiff's wife, is evidence of the defendant's feeling with reference to the entire transaction, as, in a case of libel, the publication of an additional libel may be proved as evidence of malice.

MARTIN, B.—I am of the same opinion. The action is brought for causing the plaintiff to be apprehended; and he must prove, that it was done without reasonable cause and maliciously. The plaintiff was not a rogue and vagabond; for the 4th section does not make the leaving of a wife and family an offence, unless chargeability has actually occurred. Then comes the question; was the act of the defendant done maliciously? If the defendant had merely gone to the overseer, and simply and honestly stated what had occurred, such an act could not have been said to have been malicious. But it was a question for the jury, whether he was acting in good faith or not; and it certainly was evidence of malice, that the defendant, with the assistance of the parish officers, had endeavoured to concoct a case against the plaintiff after his apprehension.

BRAMWELL, B.—I am also of opinion that the ruling of

my brother *Alderson* was correct. I think, too, that if a man leaves his wife or family, under such circumstances that chargeability is the natural and necessary consequence of his so leaving them, he commits the offence by running away, but it cannot be known that it is committed until the wife or family are actually chargeable.

Rule refused.

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## THE EARL OF LUCAN v. SMITH.

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**T**HIS was an application for leave to plead several matters. —The declaration stated, that the plaintiff had held the appointment and served as lieutenant-general, commanding the cavalry division of her Majesty's forces employed in the war against Russia; and that the defendant falsely and maliciously printed and published of the plaintiff, as such lieutenant-general, the words following, that is to say:—

“ Ill as we think of Lord Lucan (meaning the plaintiff) and Lord Cardigan, we feel convinced, that had they been under the orders of a competent commander-in-chief, of one who would have known and treated them as soldiers only, even they would not have disgraced and discredited the name and fame of England, or would have been obliged to resign. Insolent and disorderly as they are, much inclined as they are to abuse their positions, relying as they do for support on a bad system of favoritism in high quarters, they are both brave men; they have both some military spirit and aspirations, and, used as instruments by a firm, vigorous, competent commander, whose firm will they respected and feared, something might have been made of them. Not being so commanded, all their natural and acquired vices and defects had full play, and

In an action of libel, a plea setting out facts to shew that the alleged libel was a fair comment, will not be allowed to be pleaded together with a plea of not guilty.

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have introduced into the military history of their country an episode of the most discreditable description, which is not to be shuffled out of, because the Board of General Officers happens to have hit on the true cause why supplies could not be conveyed from Balaklava to the front. No,—the Lucan-Cardigan scandal still remains undiminished in real gravity, at once a warning and an instruction to the Duke of Cambridge, as to the heavy responsibility he has assumed at the Horse Guards. His first,—his imperative duty, will be to throw himself upon the young and energetic officers of the army, to seek out and elevate to places of trust, true ability and zeal, to introduce into the service a deeper sense of responsibility, a more earnest sense of duty, than the truculent insubordination of the two white-washed Peers (thereby meaning the plaintiff as one of the said two Peers), and the frivolous tone of the report upon which we have been commenting, proves to prevail among the senior members of the profession."

The defendant proposed to plead, first, not guilty; secondly, a plea in substance as follows:—"That the plaintiff was the general commanding the cavalry division in the East, and that the Earl of Cardigan was the general commanding the light cavalry brigade, part of such force; that during such command disputes arose and complaints were made by each of the conduct of the other of them in their respective commands. That great disasters happened, and great losses of men and horses. That the disputes between the plaintiff and the Earl of Cardigan were injurious to the service, and were matter of public notoriety and of discussion and complaint amongst all the liege subjects of her Majesty. That the plaintiff was recalled. That her Majesty issued a commission to Sir J. Mac Neill and Colonel Tulloch to inquire into the causes of such disasters. That the said commissioners made

a report, animadverting upon the conduct of the plaintiff. That a commission, afterwards issued to the Board of General Officers, at Chelsea, who made a report with reference to the matters above mentioned. That all these things were matters of public notoriety. That the words in the declaration were part of an article in a newspaper, which was a fair and bona fide comment on the conduct of the defendant in his public capacity, and were published without any malice on the part of the defendant."

*Field* now moved accordingly, and argued that the object of the plea was to put upon the record facts shewing that the alleged libel was a fair comment on the public conduct of the plaintiff as a public servant, and that it was not a plea of justification.

*Lush* shewed cause in the first instance.—Under the plea of not guilty, the defendant is at liberty to shew that the article is a fair comment. The proposed second plea purports to be a colourable justification. The effect of it is to introduce irrelevant matter upon the record. The allowance of it would enable the defendant to put irrelevant questions and introduce topics calculated to prejudice the jury. By Reg. Gen. T. T. 1853, 2, several pleas founded on the same subject matter of defence are not to be allowed. [*Bramwell, B.*, referred to *Hoare v. Silverlock (a)*.]

*Field* was heard in support of the rule.

**ALDERSON, B.**—This special plea ought not to be allowed with the general issue. It only states matter of evidence, which is for the jury, not for the Court.

(a) 9 C. B. 20.

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BRAMWELL, B.—If this plea were allowed, the defendant might seek to avail himself of it to introduce irrelevant evidence, and, if the Judge at the trial refused to receive the evidence, would doubtless complain of his decision.

POLLOCK, C. B., and WATSON, B., concurred.

Rule refused.—The defendant to be at liberty to plead, in addition to the general issue, in general terms that the alleged libel was a fair comment.

Nov. 20.

Mews v. Carr.

The plaintiff put up for sale by public auction a quantity of timber, several lots of which were unsold. A few days afterwards the defendant called on the auctioneer and selected from the catalogue two of the unsold lots, which he agreed to purchase. The auctioneer then wrote in the defendant's presence his name in the catalogue opposite these

lots : *Held*, that the auctioneer was not the agent of the defendant so as to bind him by signing his name, and consequently there was no sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds.

that on the said exposure to sale of the said timber, the defendant became the highest bidder for, and the purchaser of, (to wit,) two lots of the same, on the conditions aforesaid, at and for a certain sum (to wit,) of 183*l.* 6*s.*, and he agreed with the plaintiff to become the purchaser thereof on the said conditions, and at and for the said price, and to comply with the said conditions, and the plaintiff accepted him as such purchaser; and although the plaintiff has at all times been ready and willing to do and perform, and has done and performed all things, and all things have happened to entitle him to a performance by the defendant of the said conditions of sale and his said agreement, and although the defendant, according to the said conditions of sale and his said agreement, ought to have paid for and cleared away the said lots within twenty-eight days from the day of sale, yet the defendant did not nor would, at any time within the said space of twenty-eight days from the day of sale, pay for or clear away the said lots or any part thereof; and thereupon, in accordance with the said conditions of sale, and after the expiration of the said period of twenty-eight days from the day of sale, and in a reasonable time in that behalf, the plaintiff did resell the said lots by public auction at and for a less sum than the amount so to have been paid for the same by the defendant as aforesaid, to wit, at a loss of 20*l.*; and the plaintiff was put to and incurred great expense, to wit, a further sum of 20*l.* for and in respect of divers charges and expenses attendant on such resale, &c.: of all which premises the defendant afterwards, and before the commencement of this suit, had notice, and was then requested by the plaintiff to pay him the said several sums, but the defendant has hitherto wholly neglected and refused so to do.

Plea.—That the defendant did not become the highest bidder for, and the purchaser of, the said two lots on the

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said conditions, nor did he agree to become the purchaser thereof on the said conditions, at and for the said price and to comply with the said conditions; nor did the plaintiff accept him as such purchaser as alleged.

Replication, taking issue on the plea.

At the trial before *Pollock*, C. B., at the last Surrey Assizes, it appeared that on the 26th October, 1856, one Churchill, on behalf of the plaintiff, put up for sale by auction several lots of timber, under the conditions of sale mentioned in the declaration. All the lots were not sold; and on the following day the defendant called at the office of Churchill and inquired what lots remained unsold? Churchill thereupon shewed him the catalogue, and he selected two lots, which he agreed to purchase. Churchill then wrote the defendant's name in the catalogue opposite these lots. Two or three days after, the defendant again called and requested to know what further lots remained on hand. The catalogue was shewn to him, and he selected two other lots; and on being informed the terms, he said he should consider whether he would become the purchaser of them. About the 9th November he again called, and on this occasion he agreed to purchase these two lots. Churchill then wrote, in the defendant's presence, his name in the catalogue opposite these lots, and also the agreed price, 10*l.* 10*s.* per standard. The defendant then stated that as the prompt day fixed by the conditions of sale at twenty-eight days after the day of sale, viz., on the 23rd November, was so near, he could not pay for the lots then, and it was agreed that the twenty-eight days should be calculated from the 9th November. Evidence was adduced to shew that, by the custom of the trade, persons who purchased lots from those remaining unsold at an auction were always considered as bound by the conditions of sale, the same as if they had purchased at the auction.

It was objected, on behalf of the defendant, first, that Churchill was not the agent of the defendant so as to bind him by his signature, and consequently there was no contract in writing as required by the 17th section of the Statute of Frauds. Secondly, that this, being a sale by private contract, was not subject to the conditions mentioned in the declaration. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Hawkins, in the present term, obtained a rule nisi accordingly, against which

Montagu Chambers and *Mathew* now shewed cause.—The auctioneer was the agent of the defendant, and the sale was on the conditions stated in the catalogue. [*Pollock*, C. B.—The cases have established that the auctioneer is the agent of both parties at the time of the sale; but a traveller, going about to collect orders, who writes the names of those who give orders, in his order book, does not bind them as buyers.] *Bird v. Boulter* (*a*) decided that an auctioneer's clerk, who is present at a sale, is the agent of the persons to whom the lots are knocked down, so as to bind them by his entry in the sale book. In *Graham v. Musson* (*b*), the plaintiff's traveller, having received from the defendant an order for goods, made and signed *in his own name* an entry of the contract in a book of the defendant, and that was held not a sufficient memorandum within the Statute of Frauds; but the Court there say, that if the traveller had signed the defendant's name, and he had not dissented from it, the case would have resembled *Bird v. Boulter*. Here the broker signed the name of the defendant in his presence.

(*a*) 4 B. & Adol. 443.

(*b*) 5 Bing. N. C. 603.

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Hawkins appeared to support the rule, but was not called upon.

POLLOCK, C. B.—The rule must be absolute. The sale in question took place some days after the auction was over, and therefore, as regards the Statute of Frauds, the case must be determined as any other ordinary sale. The parties cannot set up a custom of trade to repeal the Statute of Frauds. No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only; and the signature of the seller or his agent cannot bind the buyer. The question is, whether there is any evidence to take the case out of the Statute of Frauds, and I think that there is none.

ALDERSON, B.—I am of the same opinion.

BRAMWELL, B.—The only reason why I make any remark is, that the observations of the Court in *Graham v. Musson* (*a*) may not be misunderstood. There the Court said, that if the traveller had signed the defendant's name, and he had not expressed any dissent, that would have been a recognition of agency. Here the auctioneer signed the defendant's name, not purporting to act for him, but as the person who sold the goods. It is now established that an auctioneer, at the time of the sale, is agent for both buyer and seller; but as soon as the sale is over, the reason for the rule fails, and he is certainly not the agent of the buyer, unless he has some authority to act on his part.

WATSON, B., concurred.

Rule absolute.

(*a*) 5 Bing. N. C. 603.

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THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL v. JONES.

Nov. 15.

DEBT to recover the sum of 118*l.* 4*s.* 10*d.*, being the amount of an improvement rate assessed on the defendant, as owner and occupier of certain land adjoining and abutting on a street paved, &c. by the Local Board of Health of Kingston-upon-Hull.—Plea: Never indebted.

At the trial, before Bramwell, B., at the last York Assizes, the following facts appeared:—Previously to the works of the plaintiffs, there ran in front of some land of the defendant, and lands of others on either side of his, a public footway. Parallel and next to the footway was a strip of land, the property of the Corporation of Hull, over which there was no way or right of way, public or private. Parallel and next to that was a piece of land used as an occupation way, and beyond and next to that, other land, inclosed and belonging to various owners. In 1855 the plaintiffs having acquired from the owners of the soil a right so to do, made roads, or a road (as they said), which, with the footpaths, comprehended the old footpath, the first parallel strip, and the occupation way. In the middle of what they called the road (but between two roads, as the defendant said), they reserved a strip of land for a promenade, which they planted with trees, and made communications through it from the one road, or one part of the road, to the other. For the paving and flagging and channelling of this road or roads, the plaintiffs sought to recover the rate in question, under the 96th section of "The Public Health Act," 1848 (11 & 12 Vict. c. 63) and "The Kingston-

The 99th section of "The Public Health Act, 1848," does not empower a Local Board to make new streets, and rate the owners of the adjoining land for paving them, &c., but the enactment only applies to existing streets not repairable by the parish.

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upon-Hull Improvement Act," 1854 (17 & 18 Vict. c. c.) The learned Judge was of opinion that the action was not maintainable, and under his Lordship's direction a verdict was found for the defendant.

Sir F. Thesiger now moved for a rule nisi for a new trial, on the ground of misdirection.—The question depends on the consideration of certain clauses in "The Public Health Act," 1848, and "The Kingston-upon-Hull Improvement Act," 1854. The 69th section of the Public Health Act provides, "That in case any present or future street or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, &c., require them to sewer, level, pave, &c. the same, within a time to be specified in such notice; and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor," &c. The term "highway" is explained by the 15 & 16 Vict. c. 42, s. 13, as meaning "any highway repairable by the inhabitants at large." By the interpretation clause of the Public Health Act (sect. 2), the word "street" shall apply to and include any highway (not being a turnpike road), and any "road, &c." "whether a thoroughfare or not." Therefore this new road, made by the Local Board, was a "street" within the meaning of that Act. By the 27th section of the Kingston-upon-Hull Improvement Act, the

Local Board may, by agreement, purchase and otherwise acquire lands. By section 80, the Local Board is empowered, by agreement with the owners of any lands, to lay such lands into the street, and all parts of such streets shall be public streets. Therefore it was clearly competent for the Local Board to agree with the Corporation for the purchase of this piece of land, and lay it into the street. The charge upon the owner of the adjoining premises is in respect of his frontage, therefore he is to pay in proportion to the benefit which he receives from the improvement. The Public Health Act empowers the Local Board to make two descriptions of rate, viz., a "special district rate" (sect. 86), and a "private improvement rate" (sect. 90); and by the Kingston-upon-Hull Improvement Act the rate may be either wholly prospective or wholly retrospective, or partly prospective and partly retrospective. The 128th section of the latter Act provides, "That, subject to the power of the Local Board to recover in a summary manner from the owners of premises, fronting, adjoining or abutting upon any street (not being a highway), the expenses of sewerage, levelling, paving, flagging, and channelling of such street, the Local Board, for the purpose of defraying their expenditure in or about the first paving and flagging by them of any streets," &c., "shall make and levy, in respect of the premises situate in the district or part of a district, for the benefit of which the expenditure is or is to be incurred, one or more special district rate or rates, or private improvement rate or rates for the same." *Elmer v. The Local Board of Health of Norwich* (a) is an authority that, for the purpose of defraying the expense of making this street, the Local Board may levy a rate on the district which receives a special benefit. The words in the 69th section of the Public Health Act, "not being a

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(a) 3 E. & B. 517.

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highway," do not exempt the defendant from liability to this rate; they apply only to cases where the entire street, and not merely a portion of it, is a highway. The words, "or any part thereof," mean any portion of the street, not longitudinally, but across it. Here the way is strictly within the definition of a "street," and that street has been paved by the Local Board, and the defendant is the owner and occupier of premises adjoining and abutting on the street, and has derived benefit from the improvement, and therefore he is liable to the rate.

Cur. adv. vult.

ALDERSON, B.—In this case we are of opinion there should be no rule. The facts are few and simple. (His Lordship then stated the facts as above set forth.)

For the paving and flagging and channelling of this road or roads, they seek to charge the defendant under the 11 & 12 Vict. c. 63, s. 69, as explained by and incorporated with other powers in their private Act. But they have no power to do so. The object of the section is plain. Where a road has been made which is not repairable by the parish, it may become a public nuisance or injurious to public health, and the legislature thought it right that those who own the property for the convenience of which the street was made, should be at the expense of preventing it being a mischief to the public. But it is impossible to suppose the legislature intended to give the Board of Health the power of making new streets, and compelling the adjoining owners to pay for them, and accordingly we find in the section the words "if any street, &c., be not paved to the satisfaction of the Local Board,"—evidently supposing an existing street, and an existing defect at the time of the dissatisfaction,—"they may require the adjoining owner to sewer," &c.,—not to make a street, but do something to one

existing; and if not done, then the Board may do it, and recover the expense. Here the plaintiffs have made a new road or roads, and they never could have called on the defendant to level or pave a road, not levelled or paved to the satisfaction of the Board, unless we suppose they originally made it improperly, in order to give themselves jurisdiction by making it to their own dissatisfaction.

They first contended that the footway was not a public way. How, if that is so, the defendant was to be liable, it is not easy to see; but it was clearly shewn, and is now admitted, to have been a public highway repairable by the parish. Then, either the present road or roads and footways are the old public way altered, or are a new way or ways. In the former case the defendant's land does not abut on a highway not repairable by the parish; in the latter, there is a new road, which is not within the section in question. Or if it is said there is a way partly new and partly old, and partly repairable by the parish and partly not, then again the statute does not apply, as that relates only to highways in no part repairable by the parish. In a word, the defendant's land did not abut on a highway not repairable by a parish. We were pressed to grant the rule on the ground that the question is of importance. We cannot see how, as we do not suppose a similar view will be taken of the statute by any other Board, or, if taken, will be acted on. But, important or not, the question is one on which we entertain no doubt, and therefore we ought to refuse the rule.

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Rule refused.

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ARANGUREN v. SCHOLFIELD and Others.

Where an action is brought on a bill of exchange, which is alleged to have been lost, a Judge has no power to order a stay of proceedings until an indemnity be given, the defendant undertaking to pay the debt and costs.

THIS was an action against the defendants as acceptors of a bill of exchange for 795*l*. 7*s*. 11*d*. After the bill became due, application was made to the defendants for payment, but the bill was not produced, it being alleged that it was lost. The present action having been commenced, the defendants offered to pay the debt and costs on receiving a satisfactory indemnity against the claim of any other person. The plaintiff refused to give any indemnity, whereupon the defendants took out a summons at Chambers, which was heard before *Crowder*, J., who made the following order:—

“Upon hearing the attorneys, &c., I do order that, the defendants undertaking to pay the debt and costs, the plaintiff do give the defendants an indemnity to the satisfaction of one of the Masters of the Court of Exchequer against the claims of any other person upon the bill of exchange upon which this action is brought, and that until such indemnity be given, all further proceedings be stayed.”

Burnie had obtained a rule calling on the defendants to shew cause why the above order should not be rescinded.

Manisty shewed cause.—The learned Judge had power to make the order either under the Common Law Procedure Act, 1854, or at common law. By the 87th section of that Act, “In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is

given, to the satisfaction of the Court or Judge, or a Master, against the claims of any other person upon such negotiable instrument." This is in effect an order under that enactment. Unless an indemnity be given, the defendants may plead the loss of the bill, and so defeat the action. Moreover, at common law a Judge may, under certain circumstances, stay proceedings until an indemnity is given. If, in an action of detinue, the defendant offered to deliver up the chattel and pay the costs, but the plaintiff refused to receive it, the Court would not allow him to proceed with the action. Here the defendants are willing to pay the debt and costs, provided they are secure against the claims of any other person.

Burnie, in support of the rule.—The 87th section is an enactment for the benefit of a plaintiff, not of a defendant. Formerly the owner of a lost bill was obliged to resort to a Court of equity to obtain a new bill or payment, on giving an indemnity (*a*). It is only upon the application of a plaintiff, to prevent a defendant from setting up the loss of the bill, that a Judge has any jurisdiction under the 87th section. Here the plaintiff does not object to the defendant pleading that the bill is lost, and a Judge has no common law power to prevent him from trying that issue. The plaintiff may not have the means of giving an indemnity for so large an amount; in which case the order will prevent the plaintiff from recovering his debt.

PER CURIAM (*b*).—We are all of opinion that the rule must be absolute.

Rule absolute.

(*a*) See 9 & 10 Wm. 3, c. 17, s. 3; *Walmsley v. Child*, 1 Ves. Sen. 346. (*b*) *Pollock*, C. B., *Alderson*, B., *Bramwell*, B., and *Watson*, B.

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SHARP v. FOX.

After the Reg. Gen. E. T. 1856, (which prescribes that service of pleadings on Saturday, after 2 o'clock, shall be deemed as made on the following Monday), to a declaration delivered on the 1st of August, the defendant after 2 o'clock on the 9th, which was Saturday, delivered a plea at the office of the plaintiff's attorney.

Held, that judgment, for want of a plea, signed on the 12th was regular.

G. *FRANCIS* had obtained a rule to shew cause why the judgment signed herein should not be set aside for irregularity.—The declaration was delivered on the 1st of August, indorsed to plead in eight days. On Saturday, the 9th of August, after two o'clock, P. M., the defendant's attorney delivered a plea at the office of the plaintiff's attorney. The plaintiff's attorney received the plea, and did not return it. On Tuesday, the 12th of August, the plaintiff's attorney signed judgment as for want of a plea. The clerk of the plaintiff's attorney stated that he attended at the office till six o'clock on Saturday; that the plea had not been delivered at the time when he left; and that he was not aware that the plea had been delivered at the office until the morning of Monday, the 11th.

Peteredorff now shewed cause (a).—By the 2 Wm. 4, c. 39, s. 11, no declaration or pleading after declaration shall be filed or delivered between the 10th of August and the 24th of October. In *Mills v. Brown* (b) it was held that a plea delivered during that period was a nullity. By Reg. Gen. E. T., 19 Vict. (c), which is substituted for rule 164 of

(a) Before *Bramwell*, B., sitting alone.

(b) 9 Dowl. 151. He referred also to *Trinder v. Smedley*, 3 Dowl. 87.

(c) Easter Term, 19 Vict., 1856.—Service of pleadings, notices, &c. It is ordered that in lieu of Rule 1640, the Practice Rules of Hilary Term, 1853, the following be substituted:—

Service of pleadings, notices,

summons, orders, rules, and other proceedings shall be made before 7 o'clock P.M., except on Saturdays, when it shall be made before 2 o'clock P.M. If made after 7 o'clock P.M. on any day except Saturdays, the service shall be deemed as made on the following day, and if made after 2 o'clock P.M. on Saturday, the service shall be deemed as made on the following Monday.

the practice rules of Hilary Term, 1853, service of pleadings, &c., shall be made on Saturdays before two o'clock, P.M.; if made after two o'clock, P.M., on Saturdays, the service shall be deemed as made on the following Monday. The time to plead having expired on the 9th of August, and the delivery of the plea having taken place after two o'clock on that day which was a Saturday, the delivery operated as a delivery of the plea on Monday.

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G. Francis, in support of the rule.—By the Reg. Gen. H. T., 1853, r. 9, in case the time for pleading shall not have expired before the 10th of August, the party called upon to plead shall have the same number of days for that purpose after the 24th of October as if the declaration had been delivered on the 24th of October. Here the eight days ended on the 9th, the 10th was on a Sunday. The defendant had some time to plead on the next day on which, according to the practice of the Court, he could plead. In *Morris v. Hancock*, (a) *Patteson*, J., says, “a defendant has a right to plead at any time during the last day of his time for pleading, and down to the time of opening of the judgment-office on the next day, that is, until eleven o'clock the next morning.” In *Severin v. Leicester* (b), the Court of Queen's Bench recognised *Morris v. Hancock*. Here the defendant was entitled to a part of the 10th, and the 10th being on a Sunday, when the defendant could not plead, he was entitled to have this time on some day when he could plead. The time had not expired before the 10th. The delivery of a plea on the Saturday, though after two o'clock, was not a nullity. It is merely by a legal fiction that the plea is taken to have been

(a) 1 D. N. S. 320.

(b) 12 Q. B. 949.

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delivered on Monday. The irregularity might have been waived. The plaintiff might have treated the plea as well delivered, and joined issue upon it either on the Saturday or on the 24th of October. The rule of Easter Term, 1856, does not make the delivery a nullity.

BRAMWELL, B.—This rule must be discharged. The effect of the act of parliament, according to the decisions, is, that a plea delivered after the 10th of August is a nullity. Then came the rule of Easter Term, 1856, which says, that all pleadings delivered after two o'clock on Saturday shall be deemed to have been served on Monday. Here the plea, having been delivered after two o'clock on Saturday, must be taken to have been delivered on the following Monday, and consequently after the 10th of August and within the period during which the Act says "that no pleading shall be delivered." Rule 9, H. T. 1853, is against the defendant. The words are, in case the time *shall not have expired before* the 10th day of August the party shall have the same number of days after the 24th of October as if the declaration had been delivered on the 24th. It is said that here the defendant had a portion of time after the 8th day, viz., until the opening of the office on the next morning; but that is a fallacy. He may plead, if he can, up till the time when judgment is actually signed, but he has no right to any time after the 8th day. If the Court ordered the judgment-office to open at seven in the morning he would have no time in fact; therefore, as here the defendant had no time after the 9th, the time to plead expired before the 10th of August. The dictum of Patteson, J., in *Morris v. Hancock* (a), is correct with

(a) 1 D. N. S. 320.

reference to the matter with which he was dealing. He was explaining, that if the time had expired on the 9th of August, the defendant would practically have had till the opening of the judgment-office on the 10th, and that in order to prevent a defendant from being deprived of that privilege where the time expired on the 10th, the time was taken one day back, and therefore the rule was framed in the form which it now appears. But this case is not within the rule, because the time expired *before* the 10th. And as the plea was delivered after the hours of business, limited by the rule E. T., 1856, it operates as a delivery at a time when the statute makes it a nullity. As to the point that the delivery on Saturday, after business hours, was an irregularity, and that the plaintiff should have obtained an order to set it aside, the rule does not say that no pleadings shall be delivered on Saturday after two o'clock, but that service shall be deemed to have been made on the following Monday, a day on which the statute says that no pleadings shall be delivered. The effect of the statute and the rule taken together is, that where the 9th of August is a Saturday, no pleadings can be delivered after two o'clock on that day.

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Rule discharged.

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## LEGGE v. TUCKER.

A declaration stated that the plaintiff, at the defendant's request, delivered to the defendant, then being a livery-stable keeper, a horse of the plaintiff, to be by him taken due and proper care of, and to be kept in a separate stall in the defendant's stable, for reward to the defendant to be paid by the plaintiff in that behalf. And the defendant accepted the care and custody of the said horse upon the terms aforesaid: yet he would not, whilst he so had the care and custody of such horse upon the terms aforesaid, take due and proper or any care thereof, or keep it in a separate stall as aforesaid; and by means of the premises the same horse was so injured and kicked by other horses that the same horse of the plaintiff became and was of no use or value to the plaintiff, and the plaintiff was deprived of the use thereof and has been compelled to hire other horses, from time to time, to supply the place of the said horse.—The defendant pleaded first, not guilty: secondly, a denial that the plaintiff delivered the horse to the defendant to be taken care of, &c., as alleged in the declaration. Issue having been joined on the pleas, the cause was tried before *Martin*, B., at the London Sittings after last Trinity Term, when a verdict was found for the plaintiff with 7*l.* damages. No certificate was granted. The Master having taxed the plaintiff his full costs, the defendant took out a summons at Chambers calling on the plaintiff to shew cause why the

for the plaintiff, with 7*l.* damages. Held, that the cause of action was founded on contract, not on tort, and consequently the plaintiff was deprived of costs by the County Court Act, 13 & 14 Vict. c. 61, s. 11.

Master should not review his taxation; or why the postea and judgment thereon should not be amended by striking out so much thereof as relates to costs. The summons was heard before *Crowder*, J., who referred the matter to the Court.

*Prentice* having obtained a rule nisi in the terms of the summons,

*Lush* shewed cause.—The question is, whether this declaration is in assumpsit or case. By the County Court Act, 13 & 14 Vict. c. 61, s. 11, a plaintiff who recovers in a superior Court a sum not exceeding 20*l*. in an action of "covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage," or a sum not exceeding 5*l*. "in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction," shall have judgment to recover such sum only, and no costs. This is an action on the case. It is true that the cause of action originates in contract, but it is one for which the plaintiff might sue either in assumpsit or case, and he has adopted the latter form. [*Martin*, B.—If a plaintiff declares in case, he must declare upon the general duty of every person to conduct himself with care.] In *Govett v. Radnidge* (*a*), the declaration stated that the defendants had the loading of a hogshead of the plaintiff for certain reward, and they so negligently conducted themselves in the loading, that by reason thereof the hogshead was let fall and damaged; and it was held that the gist of the action was the tort, and not the contract out of which it arose. [*Martin*, B.—In *Bretherton v. Wood* (*b*), which was an action against a stage coach proprietor for injury to a passenger by upsetting the coach, it was held that the action was founded in tort. But in the case of

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(a) 3 East, 62.

(b) 3 B. & B. 54.

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carriers, the custom of the realm imposes on them a duty to carry safely, and a breach of that duty is a breach of the law, for which an action lies founded on the common law, and which does not require a contract to support it. So in the case of a farrier who shod a horse negligently, he might be sued in tort.]—He also referred to *Powell v. Layton* (*a*).

Prentice appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B.—The rule must be absolute. Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit; but where there is a duty ultra the contract, the plaintiff may declare in case.

ALDERSON, B.—I am of the same opinion. The right of the plaintiff to sue at all depends on a contract, and consequently it is an action of contract.

MARTIN, B.—I am of the same opinion.

WATSON, B.—The action is clearly founded on contract. Formerly, in actions against carriers, the custom of the realm was set out in the declaration. Here a contract is stated by way of inducement, and the true question is, whether, if that were struck out, any ground of action would remain: *Williamson v. Allison* (*b*). There is no duty independently of the contract, and therefore it is an action of assumpsit.

Rule absolute.

(*a*) 2 N. R. 365.

(*b*) 2 East, 452.

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MICHAELMAS VACATION, 20 VICT.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

Nov. 27.

KINGSFORD and Another v. MERRY.

THIS was an appeal under the 34th section of the Common Law Procedure Act, 1854, the Court having refused a rule (*a*) to shew cause why the verdict should not be entered for the plaintiffs pursuant to leave reserved. The case stated by the parties (so far as material) was as follows:—

The declaration was for the conversion by the defendant of three tons of tartaric acid of the plaintiffs. The pleas were, not guilty, and not possessed; upon which issues were joined.

In April, 1853, J. & Co., brokers, sold for the plaintiffs, manufacturing chemists, two tons of tartaric acid, to be delivered in November. In October, 1853, G. & Co., brokers, sold for the plaintiffs two tons of tartaric acid, to be also delivered in November. J. & Co. and G. & Co. respectively sent to the plaintiffs sold notes, not disclosing any principal. In November, a clerk of one Anderson, a merchant, left at the plaintiffs' counting house two delivery orders. One was from J. & Co., for delivery to T. Broomhall or order of one of the tons of acid: this order was indorsed by T. Broomhall, "Deliver to my order." The other delivery order was from G. & Co., for delivery to T. Broomhall or order of the two tons of acid: this order was indorsed, "T. Broomhall—Deliver to W. Leask: J. Ellis—Deliver at Custom House Quay to my sub-order. W. Leask." Anderson induced Leask to purchase from Ellis the acid for him, upon a false representation that he was acting on behalf of V. N. & Co. Ellis thereupon gave to Leask the delivery orders which he had received from Broomhall. Leask indorsed the orders specially deliverable to himself, and delivered them to Anderson for the purpose of enabling him to inspect the acid. On the 28th of November Anderson went to the plaintiffs and stated that he had purchased from Leask the acid mentioned in the delivery orders, and he requested the plaintiffs to deliver it at the Custom House Quay for him. On the faith of this statement, the plaintiffs gave Anderson a delivery order and the acid was transferred into his name. Anderson then obtained warrants and pledged the acid with the defendant for a bona fide advance.

Held, in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer) that under these circumstances, the relation of vendor and vendee did not subsist between the plaintiffs and Anderson, neither did the property in the acid pass to Anderson; and that mere possession, with no further indicia of title than the delivery orders was not sufficient to entitle the defendant, though a bona fide pawnee, to resist the claim of the plaintiffs in an action of trover.

On appeal under the 34th section of the Common Law Procedure Act, 1854, if a rule nisi be granted, cause must be shewn in the first instance, and only one counsel on each side will be heard.

The statement of the case does not preclude the

(*a*) See the case 11 Exch. 577.

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The cause was tried before *Pollock*, C. B., at the London sittings after Michaelmas Term, 1855, when the following facts were proved by the witnesses for the plaintiffs.—The plaintiffs were manufacturing chemists at Bow Common, in the county of Middlesex, and the defendant was a drug broker, carrying on business at Fenchurch Street, in the city of London. In April, 1853, Messrs. Jones, Thompson & Co., of Liverpool, sold for the plaintiffs six tons of tartaric acid, of which two tons were to be delivered in the next November, and they sent to the plaintiffs the following sold note:—

“ B. Exchange Buildings,
 “ Liverpool,
 “ April 25, 1853.

“ Messrs. Kingsford & Swinford.

“ We have this day sold for you the following goods, 6 Tons Tartaric Acid at 1s. 4d. per lb. as under,—

“ viz. to Selves,

“ One Ton to be delivered in London in all Septr.	1853.
“ To Mr. James Roe One Ton do. do. Octr.	
“ Two Tons do. do. Novr.	

“ Two Tons do. do. Decr.

“ Customary allowances.

“ Payment Cash in 14 days from date of each Invoice, less 5 % disct.

“ Respectfully Yours,

“ Jones, Thompson & Co.
 “ Brokers.”

On the 14th October, 1853, Messrs. Gray & Co., of Mincing Lane, brokers, sold for the plaintiffs two tons of tartaric acid, to be delivered also in the month of November, and the following was the sold note sent by them to the plaintiffs:—

“ London, 14 Octr. 1853.

“ Messrs. Kingsford & Swinford.

“ We have this day sold for your account 2 Tons Tartaric Acid Crystals of good merchantable quality at 1s. 9d. per lb. to be delivered in November next—Customary Conditions—Prompt 14 days after delivery—Discount 5 per Cent.

“ Brokerage 1 per Cent.

“ Your obed. Servants,
 “ Gray & Co.”

In pursuance of these contracts, invoices were, on November 1st, 1853, sent in the usual course by the plaintiffs to, and received by, Messrs. Jones, Thompson & Co., and Gray & Co., about the middle of the same month. After the sending of the invoices, two delivery orders were left at the counting house of the plaintiffs by a clerk of Anderson, which were the only documents the plaintiffs received to vouch for the representations of Anderson, as to his being the owner of the acid, before they transferred it to his name, as hereinafter mentioned. One of the delivery orders was in the following form:—

“ Liverpool, 4 Novr. 1853.

“ Messrs. Kingsford & Swinford.

“ Please deliver to Mr. Thomas Broomhall, or order, One Ton Tartaric Acid, part of Two tons Invoiced 1st inst. On payment of £149. 2s. 11d., and oblige,

“ Bow Common.

“ Yours respectfully,

“ London.”

“ Jones, Thompson & Co.”

This order was, at the time it was so left at the counting house of the plaintiffs, indorsed as follows:—

“ Please deliver to my orders given out and furnish me with separate Weights of Casks.

“ Thomas Broomhall.”

“ 155, Fenchurch St.,

“ 10 November, 1853.”

At the foot of this last mentioned indorsement are the words “delivered to Anderson,” which the plaintiff C. Kingsford stated was a private memorandum of his own. The other delivery order was in the following form:—

“ London, Novr. 12, 1853.

“ Mincing Lane.

“ To Messrs. Kingsford & Swinford.

“ Please deliver to Mr. T. Broomhall, or order, the under-mentioned Goods, charges from —— to be paid by Bearer.

“ Two Tons Tartaric Acid Crystals.

“ Mark	Lot or	Two Tons Tartaric Acid
	No.	Crystals.

“ Invoiced as 4480lbs. Net.

“ Gray & Co.”

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M.W.
—
Anderson
—
Wm.

The order was, at the time it was so left at the counting house of the plaintiff, informed as follows—

* William Johnson.

* Deliver to Mr. W. Lusk.

* John Ellis.

* Please deliver to Custom House Quay in my name-order.

* William Lusk.

The said William Lusk was a broker in the city of London.

These two delivery orders, with the information therein above except the memorandum "delivered to Anderson," were, about the middle of November, 1857, left at the counting house of the plaintiff by a clerk of Anderson, who there was carrying on business as a merchant in the city.

After the delivery orders had been so left at the plaintiff's counting house, and before the 1st November, Anderson called upon the plaintiff, and saw the plaintiff C. Kingsford, and told him that he had purchased the "three new mercantile seal" mentioned in the delivery orders from Lusk, and requested him to deliver them to his order at Custom House Quay. On the basis of Anderson's statement that he had purchased the three new from Lusk, the plaintiff C. Kingsford directed one of their clerks to deliver them according to Anderson's request, and the "three new mercantile seal" were delivered on November 1st, 1857, at Custom House Quay, but, by a mistake of the clerk, they were made deliverable to the order of the plaintiff themselves, instead of in Anderson's order.

On November 29th, Anderson again called on the plaintiff C. Kingsford, and on his second representation that the seal was his, the said plaintiff gave to him an order of which the following is a copy—

"Mr. Blake,
" East Warehouse.
" Supt.
" Custom House Quay,
" Please transfer to the order of Mr. Anderson 180/2
186/191 Nine Casks of Tartaric Acid—charges to him.
" Kingsford & Swinford."

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Anderson, on the said 29th November, took the last mentioned order to Messrs. Hall, at Custom House Quay, and the said acid was thereupon and then transferred by them into his name, and thenceforth held by them to his order and on his account.

Leask (who had, previously to the year 1853, had many transactions in business with Anderson, both on his own account and for other people, and, amongst others, for Van Notten & Co.), on the 27th October, 1853, was directed by Anderson (who at that time, and until after his arrest, was believed by Leask to be the agent of, and acting for, Van Notten & Co.) to purchase, and Leask did accordingly purchase, eight tons of tartaric acid for Van Notten & Co., four tons to be delivered in November, and four in December. These eight tons were purchased by Leask of the John Ellis whose name is indorsed on one of the delivery orders set forth above.

The sold note and counterpart of the bought note of Leask, the broker, are as follows:—

"27 Octr. 1853.

" Sold a/c John Ellis.

" 8 Tons best Tartaric Acid Crystals at 2s. 6d. per lb. to be delivered, 4 Tons Novr. and 4 Tons Decr.

" 14 days after Delivery.

" 5 %

" P. & C. Van Notten & Co."

" Bought for P. & C. V. N. 8 Tons at 2s. 6d.

" Customary allowances.

" Prompt 14.

" Discount 5.

" Deliverable { Novr. } 53."
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" W. Leask."

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In part performance of the last mentioned contract, the said John Ellis, in November aforesaid, delivered to W. Leask orders for the delivery of three tons of tartaric acid, that is to say, one for the delivery of two tons, and one for the delivery of one ton. The one for two tons is the delivery order set forth above. After the receipt of the delivery orders by Leask, Anderson, whom Leask then thought was acting as agent for Van Notten & Co., asked Leask to let him inspect the acid, and Leask, having first indorsed both the orders specially deliverable to himself, gave them so indorsed to Anderson for the purpose of enabling him to inspect the acid mentioned therein, and for that purpose only. Leask never authorized Anderson to take possession of the acid, or to have it delivered at Custom House Quay for himself, or to say that he had bought it. Anderson was not authorized by Van Notten & Co. to purchase the acid for them, and they repudiated it.

On the 20th December, 1853, Anderson was apprehended on a charge of forgery. On the 21st of the same month he was duly adjudicated a bankrupt.

On the 26th November, 1853, Leask sent to the plaintiffs the following notice :—

" Messrs. Kingsford & Co.
 " Gentlemen,

" 14, Eastcheap,
 " 26 Nov. 1853.

" I find you have not sent the "Tartaric" to Custom House Quay deliverable to my order ; please to do so at your earliest convenience.

" Yours respectfully,
 " William Leask."

On the 6th December Leask again sent to the plaintiffs requiring the three tons of tartaric acid to be sent to Custom House Quay to his order. After several subsequent applications the plaintiffs sent the acid. On the 7th of December the plaintiffs served Messrs. Hall, the

proprietors of the wharf at Custom House Quay with a notice not to transfer from Anderson's name, or deliver without their instructions, the nine casks of tartaric acid then lying to his order. In reply, Messrs. Hall informed the plaintiffs that warrants for the acid had been made out and delivered to the defendant.

On the 28th November, 1853, the defendant was, for the first time, introduced to Anderson, who, on the following day, applied to him to advance money on some tartaric acid, which the defendant consented to do upon the usual terms of advances made by brokers to merchants, and an authority to sell, in default of repayment, on the 1st of February, 1854, which authority to sell was subsequently altered by giving the defendant free liberty to act as regarded sales. Anderson then stated to the defendant that he had forty-four casks of tartaric acid, and asked the defendant whether he would have the warrants for the said acid made out in his own name or in Anderson's; whereupon the defendant required them to be made out in his own name, and Anderson, on the same day, accordingly procured warrants for the said forty-four casks of acid from the said Messrs. Hall, in the name of the defendant, and delivered the said warrants (including the nine casks sent by the plaintiffs) to the defendant in pledge and as a security for the sum of 2000*l.* then advanced to him. In making the said advance the defendant acted *bonâ fide*, and in the ordinary and usual course of business, and he had not, either at the time he received the warrants and made the advance or at the time he received and sold the acid, any notice or knowledge that the acid, or any part thereof, or the warrants or any of them, were or had been claimed by the plaintiffs, or belonged to them, or that Anderson had not authority or power to deal with or pledge the acid or warrants.

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By means of the warrants the defendant obtained possession of the forty-four casks of tartaric acid, including the nine casks sent to the Custom House Quay by the plaintiffs. The defendant sold thirty-four casks of the acid, including the nine casks, by public auction on January 24, 1854, and indorsed warrants for the same to the purchasers thereof to whom the acid was accordingly delivered.

At the close of the plaintiff's case, the Lord Chief Baron directed the jury that, upon the said facts, they must find a verdict for the defendant, but reserved leave for the plaintiffs to move to enter a verdict for them for 680*l.*, if the Court, being at liberty to draw any inferences that, and to deal with the facts as, a jury would be authorized to do, should be of opinion that the plaintiffs were entitled to the verdict.

*Hugh Hill* appeared for the plaintiff (November 26) (a); when Sir *F. Thesiger*, for the defendant, stated that he had a preliminary objection to the appeal being heard, and that it was important to know what course of practice would be adopted on these appeals,—whether, in the event of a rule being granted, the opposite party was to shew cause in the first instance or on some future day, and whether more than one counsel on each side would be heard?

*Hugh Hill* submitted that the defendant, by consenting to the statement of a case, had precluded himself from objecting to the right to appeal.

Per *CURIAM*.—The parties can only come before the Court upon a case stated, and therefore the statement of the case does not preclude the objection that no appeal will lie.

(a) Before *Coleridge*, *J. Wight-*    *Williams*, *J.*, *Crompton*, *J.*, *Crow-*  
*man*, *J.*, *Cresswell*, *J.*, *Erle*, *J.*,    *Der*, *J.*, and *Willis*, *J.*

If the Court grant a rule nisi, the opposite party must shew cause in the first instance, and only one counsel on each side will be heard (*a*).

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*Hugh Hill*.—It is objected, that in consequence of the form in which the point was reserved at the trial, that no appeal will lie. By the 34th section of the Common Law Procedure Act, 1854, “In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused or granted, and then discharged or made absolute, the party decided against may appeal.” Here a point was reserved, and the right of appeal is not taken away by the circumstance that the decision may depend on the conclusion of fact which the Court are at liberty to draw from the evidence.

Sir *F. Thesiger*.—The term “point reserved” means a pure point of law, and not, as here, a mixed question of law and fact. [*Cresswell*, J.—The point is whether the law upon the existing facts entitles the plaintiff to the verdict. The Court below decided that it did not. Then the plaintiff appeals; and in order to prevent any discussion as to facts not found, this Court is to draw any inference which a jury might draw. *Wightman*, J.—If the point of law depends on certain facts, and the parties agree upon them, the Court must decide upon them.]

Per *CURLIAM*.—We are all of opinion that the objection cannot prevail.

*Hugh Hill* (*R. E. Turner* with him) then moved for a rule

(*a*) The Court also expressed a reference to the report of the a wish that in future the case case in the Court below. stated on appeal should contain

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to shew cause why the verdict should not be entered for the plaintiff, pursuant to the leave reserved at the trial.—The plaintiffs do not impugn the law as laid down in *White v. Garden* (*a*), viz., that a contract for the sale of goods, obtained by fraud on the part of the purchaser, is void only at the election of the vendor, and it is too late to declare such election after the goods have passed into the hands of a bona fide purchaser. In that case, however, the relation of vendor and vendee subsisted between the defendants and the person who committed the fraud, so that the latter had a defeasible title which he could transfer to a purchaser before the former disaffirmed the contract. Here the relation of vendor and vendee did not subsist between the plaintiffs and Anderson; but the plaintiffs gave the orders for the delivery of the acid to him upon faith of his representations being true. Therefore the question comes to this,—where a person, not being vendee, obtains goods from another by fraudulent representations, and afterwards disposes of the goods to a bona fide purchaser, does the latter acquire a title as against the person so defrauded? It is submitted that he does not. *White v. Garden* only decided that where the vendee has a defeasible title which the vendor may affirm or disaffirm, he must elect to disaffirm before the goods are transferred to an innocent purchaser. Here there was nothing, as between Anderson and the plaintiffs, which the latter could affirm or disaffirm. Anderson did not buy the goods of the plaintiffs, but of Leask. The case is not distinguishable from *Boyson v. Coles* (*b*). There the plaintiffs, having some gums for sale warehoused in their names at the London Docks, received from C., a broker, a sold note, not disclosing the name of any purchaser, and gave C. an order on the Docks for the weighing and transfer of the gums to his order, and sent him an invoice as for the gums bought of them by C., and having

(*a*) 10 C. B. 919.

(*b*) 6 M. & Sel. 14.

called upon him to settle for the gums as per contract, drew on H. for the price, which bills were accepted by H., and guaranteed by C., who afterwards pledged the gums for a valuable consideration to the defendant, handing over to him the transfer order of the plaintiffs, together with a transfer order from himself, and afterwards, and before the bills became due, became bankrupt; and it was held that the plaintiffs were entitled to maintain trover against the defendant for the gums. That case affirmed two propositions: first, that a factor cannot pledge unless the owner of the goods arm him with such indicia of property as to enable him to deal with it as his own; secondly, that where the relation of vendor and vendee does not subsist between the owner and the pawnor of property, the pawnee has no title as against the owner. In that case, the same indicia of property were entrusted to the broker as in this case to Anderson. The giving a delivery order does not operate as a transfer of the property mentioned in it: *Jenkyns v. Usborne* (a); *M' Ewan v. Smith* (b). There was nothing in the conduct of the plaintiffs which enabled Anderson to hold himself forth to the world as having, not the possession only, but the property in the goods, so as to bring the case within the principle laid down in *Dyer v. Pearson* (c). Possession is not proof of property: *Williams v. Barton* (d). Anderson had no authority to pledge the acid; he had a mere transfer of the possession without the title, and having no title, he could confer none on the defendant.

The Court having granted a rule nisi,

Sir F. Thesiger (*Atkinson*, Serjt., and *Jacobs* with him) shewed cause.—Upon the facts stated, the judgment of the Court below is right. First, it is well established that where

- (a) 7 Man. & G. 678.  
(b) 2 H. L. 309.

- (c) 3 B. & C. 38.  
(d) 3 Bing. 139.

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a party has entrusted another with the indicia of property, so as to enable him to appear the owner, and he has dealt with it as such, the former cannot recover the property from a bona fide purchaser. In *Boyson v. Coles* (*a*) the defendant was not induced to make the advance in consequence of being misled by any indicia of property which the owner had entrusted to the broker. Here there was an order by the plaintiffs to the warehouseman to transfer the acid into the name of Anderson; and upon the assent of the warehouseman the property mentioned in the order passed to Anderson: *Lucas v. Dorrien* (*b*).—Secondly, as between the plaintiffs and Anderson there was a sale to Anderson. These are floating contracts until the day of "prompt" arrives. In Story on Sales of Personal Property, s. 200, the distinction is pointed out between cases where sales are made of property to which the vendor has obtained a title by fraudulent means, and cases where he has obtained possession of the goods by felony or chance, or holds them as mere bailee; and it is said that, in the former case, he can make a valid sale of the goods to bona fide purchasers for a valuable consideration, so as to deprive the original owner of his power to reclaim them. The same distinction is also pointed out in *White v. Garden* (*c*). Again, in *Stevenson v. Newnham* (*d*), the Court recognised the principle that fraud only gives a right to avoid a contract or purchase; that the property vests until avoided; and that all the mesne dispositions to persons not parties to, or at least not cognizant of, the fraud are valid. [*Erle*, J., referred to *Ferguson v. Carrington* (*e*).] The plaintiffs, having been induced to give the delivery orders by the fraudulent representations of Anderson might have sued him for goods sold

(*a*) 6 M. & Sel. 14.

(*c*) 10 C. B. 919.

(*b*) 7 Taunt. 278.

(*d*) 13 C. B. 285.

(*e*) 9 B. & C. 59.

and delivered; *Hill v. Perrott* (*a*), *Biddle v. Levy* (*b*). Where one of two innocent persons must suffer from the fraud of a third, the loss should fall on him who has enabled such third party to commit the fraud, and not on the person who has been deceived by it. That doctrine is recognised and explained by *Savage*, C. J., in delivering the judgment of the Court in *Root v. French* (*c*).

*Hugh Hill* was heard in support of the rule.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

(*a*) 3 Taunt. 274.

(*b*) 1 Stark. Rep. 20.

(*c*) In the Supreme Court of Judicature of the State of New York, 13 Wendell, 570. The following is the passage referred to:—"It is a general rule that a person who has no title to property can convey none; but to this rule there are some exceptions. To create such exception, and to give a third person a better title and a superior equity to the true owner, such third person must have given *value* for such property, or incurred some *responsibility* upon credit of it, and *without notice* of the fraud. Such innocent third person is a *bonâ fide* purchaser for valuable consideration. In such a case the vendor, who has been defrauded of his property, and the *bonâ fide* purchaser from the fraudulent vendee, are both innocent parties; and when one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third person to commit the fraud. Possession of personal property is *primâ*

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COURT OF J.—The judgment of the Court of Exchequer appears to have been founded upon the assumption that the plaintiffs would have been warranted, by the circumstances stated in the case, in treating the transaction between them and Anderson as a contract of sale which by reason of the fraud of Anderson they might disaffirm, if they pleased, or affirm, and proceed as for goods sold and delivered, but that their right to disaffirm was subject to any intermediate right which a bona fide vendee or pawnee from Anderson might acquire. We are however of opinion that upon the facts stated in the case, the plaintiffs and Anderson never did stand in the relation of vendor and vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm.

It is stated in the evidence set out in the case, that the plaintiffs gave the delivery order to Anderson and dealt with him as they did, not as purchasing the goods from them, but as having purchased them from Leask, as falsely represented by him; giving him credit as a subcontractor by purchase from the contractor with them. There was no privity of contract between them and Anderson and it was only as representing himself, as claiming under Leask, that they gave him by the delivery order the means of possessing the goods. Such a delivery, under the circumstances of this case, would no more pass the property in the goods, than a delivery to an agent or servant of Leask would pass the property to such agent or servant. But upon the facts it appears that Anderson had no authority from Leask to receive, but only to inspect the goods, and that Anderson obtained the transfer to himself without authority and by false pretences, and mere possession with no further indicia of title than a delivery order, is not sufficient to entitle a bona fide pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action of trover. Our judgment therefore

reversing the judgment of the Court of Exchequer is, that the verdict shall be entered for the plaintiffs upon the leave reserved.

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Judgment accordingly.



### IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

COLLINS v. THE BRISTOL AND EXETER RAILWAY COMPANY.

Nov. 29.

**T**HIS was an appeal against the judgment of the Court of Exchequer, making absolute a rule to enter a nonsuit pursuant to leave reserved. The pleadings and facts are stated in the report of the case in the Court below (*a*).

*Montague Smith* (*T. W. Saunders* with him), argued for the plaintiff (*b*), and *Kinglake*, Serjt. (*Collier* with him),

headed :—"Bath Station.—To the Great Western Railway Company.—Receive the under-mentioned goods on the conditions stated on the other side, to be sent to Torquay Station and delivered to the plaintiff or his agent." One condition was, that the Company would not be answerable for loss or damage by fire. Another condition stated that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The van was placed on truck and conveyed to Bristol, where the Great Western line ends and the defendants' (the Bristol and Exeter) line begins. The same truck and guard proceeded with the van to Exeter, where the defendants' line ends, and is joined by the line of the South Devon Company, which runs to Torquay. Whilst the van and furniture were at the defendants' station at Exeter they were accidentally destroyed by fire.

*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the Great Western Railway Company received the goods to be carried on their line, subject to the stipulation against loss by fire, and that they discharged themselves by forwarding the goods to be carried by the defendants; and there being no evidence as to the terms on which the goods were to be carried on the defendant's line, they must be treated as having received them as common carriers, and were consequently liable for their loss.

(*a*) 11 Exch. 790. The only additional fact stated in the case on appeal was, that it was proved that it was the custom of the defendants to receive traffic, as the next carriers, from the Great Western Railway Company and to forward it on, receiving for so doing a mileage proportion for the carriage of the same.

It appeared that in the printed receipt note of the Company the word was "receive" not "received" as miscopied into the briefs.

(*b*) Nov. 26. Before *Coleridge*, J., *Wightman*, J., *Cresswell*, J., *Erle*, J., *Williams*, J., *Crompton*, J., *Crowder*, J., *Wilkes*, J.

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for the defendants.—The arguments were, in substance, the same as those in the Court below, and no additional authorities were cited.

Cur. adv. vult.

The judgment of the Court was now delivered by

CROMPTON, J.—In this case the only question was, whether the defendants, who were sued as railway carriers, for the non-delivery and loss of goods, were protected from a loss happening from fire, by a special contract alleged by them to have been made, excepting loss by fire from their liability.

The goods in question were received by the Great Western Railway Company at their Bath station, under a written order to “receive them, on the conditions on the other side, to be sent to Torquay station and delivered to R. C. Collins, consignee, or his agents.”

By the conditions on the other side of the receipt note, “The Great Western Railway Co. give notice (amongst other things) 4thly, That they will not be answerable for the loss of or for damage to any goods arising from fire.” By the 10th condition, “All goods addressed to consignees resident beyond the limits of the Company’s local regulations for delivery of goods from the different stations on the railway, and respecting which no directions to the contrary shall have been received previous to arrival at the station, will be forwarded to their destination by public carrier or otherwise as opportunity may offer—or they will, at the discretion of the Company by whom they may have been received, be suffered to remain on the Company’s premises or be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees, at the risk of the owners, as referred to in clause No. 4. But that the charges of

such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as complete, and the responsibility of the Company will be considered to have ceased when such carriers shall have received the goods for further conveyance. And the Company hereby give notice that any money which may be received by them, as payments for the conveyance of goods by other carriers beyond their said limits, will be so received only for the convenience of the consignors, for the purpose of being paid to such other carriers, and will not be received as a charge made by the Company upon the goods in the capacity of carriers beyond the extent of their own railway. And the Company hereby further give notice, that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond their said limits."

The goods in question appear to have been safely carried on the railway of the Great Western Company as far as the terminus of their line at Bristol, and to have been destroyed by fire whilst on the line of the defendants, on their road towards Torquay.

It was agreed at the trial that no advantage should be taken as to the action not having been brought against the proper Company; and the question was whether the exception of loss by fire extended to a loss by fire on the Bristol and Exeter line, or was confined to loss by fire on the line of the Great Western Company.

The Court of Exchequer appear to have considered the contract of carriage as one made by the Great Western Company *to carry from Bath to Torquay*; and they stated that this was the express agreement, and they treated the case as falling within the principle of the cases where a railway company receives goods for carriage to a place beyond their own line, and are therefore liable for losses on

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the further line, the Company on such line in effect carrying as their agents or subcontractors; and assuming this to be the case, they treated the stipulations in the 10th condition as repugnant and void; and assuming that there was one contract only, they considered the exception as to fire to apply to the whole of the transit from Bath to Torquay.

We cannot agree in this construction. The receipt and the 10th condition appear to us expressly framed to prevent the Great Western Company from being in the relation of carriers on the further line. The condition appears to us to be express, that they will forward the goods for places beyond their limits, but will not be carriers themselves or incur the liability of carriers beyond such limits; and that they receive the money (beyond their own charge) merely for the purpose of paying the carriage forwards, and that they will not receive such money as a charge for carrying as carriers *beyond the extent of their own railway*; and that they will not be liable for any loss beyond the limits of their own line.

It was contended, indeed, that this 10th condition only applied to cases where goods were to be sent by carriers, other than railway carriers, for distances beyond the ambit to which the railway Company was in the habit of carrying from their several stations. We see no ground for so confining the stipulation; and the latter part of it, particularly the expression "beyond the extent of their own railway," appears to us clearly to lead to a different and wider construction than that contended for. The construction we put upon the condition is, that they, the Great Western Company, will not be carriers beyond the extent of their own railway, but that they will receive the entire sum to pay themselves as carriers on their own line, and then will, as forwarding agents, pay the residue, after their own charge, to the next railway or other carrier, being

responsible as carriers no further than the extent of their own line.

We think that, by the 4th condition, the Great Western Company only stipulated as to their own individual responsibility. They say that the *Great Western Company* give notice that *they* will not be liable for loss by fire. This being in a paper whereby they also stipulate that they will not be responsible as carriers beyond their own line, we cannot see that the exception from responsibility can be considered to apply further than as an exception to the responsibility on their own line. They say, in effect, we are carriers as far as our own line goes, subject to responsibility as carriers on that line and that line only, but limiting our responsibility on that line by the exception of losses by fire.

We cannot extend such a contract to the new contract under which the defendants received the goods. It lies on the defendants to make out a special contract as to responsibility on their line, and we think that they fail in attempting to do this. It was said by the Court below, that the agreement was express by the Great Western Company to carry to Torquay, but the word "sent" appears probably to have been substituted for the words "carried" and "conveyed" for the purpose of avoiding the consequences of the decisions in *Muschamp v. The Lancaster and Preston Railway Company* (a), and other cases of that description, and the expression "sent" is not, in the sense we attribute to it, repugnant to the stipulations in the 10th condition.

Our attention was also called to the word "delivered," which might seem to apply to a delivery by the Great Western Company. That, however, cannot be the meaning of the expression, as it is clear that in the case of the delivery by the inland carrier beyond the ambit of the

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station delivery of the Company, the carriers, and not the Company, would have to deliver, and would be responsible for the non-delivery, by the express words of the stipulation.

Another argument was founded on the fact that a proportionate part of the whole charge, according to a mileage rate, appears to have been the rate to be paid to each Company, and it was argued, that if the rate was the same in proportion to distance, the risk also should be the same. We do not, however, think that any such inference can be drawn. We know nothing of the terms according to which the defendants' line received and carried goods; one Company may receive and carry for the same rate, with exceptions, which another Company may think it better for their interest to dispense with. The defendants were bound to make out that the goods were to be received and carried on their line on a special contract, excepting losses by fire, and we think that they have failed in so doing.

It appears to us that the Great Western Company received the goods to be carried on their line with a stipulation, for their own interest, excepting loss by fire from their responsibility, and that they, according to the agreement, discharged themselves by forwarding the goods to be carried by the defendants' Company. We have no evidence what were the terms on which the goods were to be carried on the defendants' line, and we must therefore treat them as received to be carried by the defendants as common carriers, and consequently, in the absence of a special contract of exemption, subject to responsibility for the loss from fire.

We think, therefore, that the judgment of the Court of Exchequer must be reversed, and that the verdict should be entered for the plaintiff for the damages found for him at the trial.

Judgment reversed, and verdict entered accordingly.

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## IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

PATTISON v. THE GUARDIANS OF THE POOR OF THE  
BELFORD UNION.

Nov. 29.

THIS was an appeal against the judgment of the Court of Exchequer, discharging a rule to enter a verdict for the defendant pursuant to leave reserved, in the case of *The Guardians of the Poor of the Belford Union v. Pattison* (*a*). The pleadings and facts appear in the report of the case in the Court below.

*Hugh Hill* (*Unthank* with him) argued for the appellant, the defendant below (Nov. 28th) (*b*).—The corn received by the treasurer, and for which he gave credit in account with the overseers, was not money received by him by virtue of his office. The defendant, as surety, is only liable in respect of the receipt by the principal of that which he is authorized to receive. A surety for the faithful accounting of all monies received by an overseer, by virtue of his office, is not liable for a sum of money borrowed by the overseer and applied by him to parochial purposes: *Leigh v. Taylor* (*c*). [*Crompton, J.*.—Suppose an overseer owed 50*l.* for rates, and the treasurer bought of him 50*l.* worth

The defendant, as surety, became bound to the guardians of a Poor Law Union, by bond conditioned (inter alia), that the treasurer of the Union should discharge the duties of his office "by receiving all monies tendered to be paid to the board of guardians, &c., by paying out of the monies in his hands of the guardians all orders on him drawn on their behalf," and that he should pay over to the guardians all balances, monies, &c., due to the Union. The treasurer, who was a corn

factor, had extensive dealings in corn, and open accounts in trade with the overseers of several of the townships, who were farmers. No money was received from these townships, but it was the practice of the treasurer to debit the overseers in his trade account with the amount of the poor rate ordered by the guardians to be paid, and then to debit himself with the amount as paid to him as treasurer. His accounts were audited half-yearly, and the credits in corn were allowed by the auditors as payments in money. At the last audit, the auditors found that 239*l.* 1*s.* 10*d.* was due from him to the guardians. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the surety was liable, inasmuch as between the treasurer and the overseers money had in effect passed.

(*a*) See the case, 11 Exch. 623. *J., Crompton, J., Crowder, J.*

(*b*) Before *Cockburn, C. J.*, and *Willes, J.*  
*Wightman, J., Erle, J., Williams,* (*c*) 7 B. & C. 491.

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of corn, and instead of handing over the money said to him, "You owe me 50*l.*, I will set off my debt against yours," would not that amount to a receipt of 50*l.* for rates? What interest has a surety in the money passing from one hand to another?] An agent who is only authorized to receive payment in money cannot receive payment in goods: *Howard v. Chapman* (*a*). [*Cochburn*, C. J.—Suppose this had been an action against the treasurer himself, could he, after having given the overseers credit for the money, have said that he never received it? The entry in his account by which he debits himself with the money is an admission that he received it.] *Todd v. Reid* (*b*) decided that an insurance broker is only entitled to receive payment for the assured from the underwriters in money; and therefore a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal. So where a policy was delivered to a broker for the purpose of settling a loss, which was adjusted by the underwriter, payable at a month, and the broker charged such underwriter in account for the loss, and transmitted to the assured an account, in which he stated himself to be debtor for the amount of the loss and for the balance of that account, and the assured drew a bill on the broker, which the latter accepted but did not pay, and the underwriter's name not having been struck off the policy; it was held that he was not discharged: *Russell v. Bangley* (*c*). *Bartlett v. Pentland* (*d*) also shews that where a principal employs an agent to receive money and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. That principle was recognised in *Stewart v. Aberdeen* (*e*), where

(*a*) 4 C. & P. 508.

(*d*) 10 B. & C. 760.

(*b*) 4 B. & Ald. 210.

(*e*) 4 M. & W. 211.

(*c*) 4 B. & Ald. 395.

the settlement in account between the broker and underwriter took place with the sanction of the principal, and was therefore held binding on him. A power of attorney to receive payment of dividends on government stock, does not authorize the attorney to receive payment otherwise than in money, or in some usual manner: *Partridge v. The Bank of England* (a). Indeed, so stringent is the rule, that if an agent is authorized to receive money in the regular course of business in a shop, a payment to him elsewhere is not good: *Kaye v. Brett* (b). [Erle J.—In *Stewart v. Aberdeen*, Lord Abinger, C. B., in summing up, expressed his opinion “that the notion had been pushed too far about the actual payment in cash, and that it appeared to him that if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank notes, or a mere transfer of accounts from one side to the other, and that it is equally a payment if it is done without fraud.”] *Stewart v. Aberdeen* was cited in *Underwood v. Nicholls* (c), where an agent having sold wine for his principal, the purchaser paid for it by returning to the agent his cheque, which the purchaser had cashed for him a few days previously; and it was held that, in the absence of any ratification by the principal, that was not a payment as between him and the purchaser, notwithstanding the transaction was bona fide. As against a surety, the condition of the bond will be construed strictly: *The London Assurance Company v. Bold* (d). *Mills v. The Guardians of the Alderbury Union* (e). Here there was no previous authority to the treasurer to receive payment otherwise than in money, and there has been no subsequent ratification of his acts. The Court below did

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(a) 9 Q. B. 396.

(d) 6 Q. B. 514.

(b) 5 Exch. 269.

(e) 3 Exch. 590.

(c) 17 C. B. 239.

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not treat the credits in respect of corn as receipts of *money*, but they considered that the bond was forfeited by the neglect to pay over the "balance" found due by the poor law auditors. The term "balance," however, means the balance of actual money in the treasurer's hands at the time of his removal from office, not the balance found by the poor law auditors. The surety is no party to the audit; then how is he bound by it? The treasurer being alive, admissions by him would not be evidence against the surety; *Middleton v. Melton* (*a*). The treasurer may appeal against the audit, but the surety has no locus standi. A party is not concluded by an erroneous account stated.

Knowles (*Manisty* with him) for the respondents, the plaintiffs below.—The authorities referred to have no application. It is conceded that an agent, who is authorized to receive payment in *money*, cannot receive payment in goods, or by writing off his own debt. But in this case the transaction is in effect a payment in *money*. There being mutual debts between the parties, it was needless for the treasurer to go through the idle ceremony of handing to the overseers the money for the corn and then receiving it back again for rates. Since the parties have chosen to treat the transaction as payment, as between themselves the treasurer is in the same situation as if he had received money: *Standish v. Ross* (*b*).—He then argued that the term "balance" meant the amount found by the poor law auditors to be due from the treasurer at the time he left office, and that their finding was conclusive unless appealed against: on this point he cited the 4 & 5 Wm. 4, c. 76; 7 & 8 Vict. c. 101, s. 34; 11 & 12 Vict. c. 91, ss. 4, 5, 7, 9.

Hugh Hill replied.

Curr. adv. vult.

(*a*) 5 Man. & R. 264.

(*b*) 3 Exch. 527.

The judgment of the Court was now delivered by

COCKBURN, C. J.—We are all of opinion that the judgment of the Court below ought to be affirmed—not on the ground that the word “balance” has a peculiar meaning in this bond, derived from the statutes relating to the poor laws, but on the ground that as between the treasurer and the overseer, money had in effect passed; and that the effect of the course of business between them as against the treasurer, is the same against his surety in this bond.

Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

BOOTH *v.* KENNARD.

No. 27.

EROR on a bill of exceptions (a).—The declaration stated that the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of certain improvements in the manufacture of gas, and thereupon her Majesty, by letters patent, &c. granted to the plaintiff the sole privilege to make, use, exercise, and vend the said invention for the term of fourteen years, from the 12th of November, 1850, and the 8th of May, 1852, &c., and the defendant infringed the said patent rights. The defendant pleaded, eighthly—That the alleged invention or inventions were not nor was either of them a matter for which letters patent could by law be granted.—Issue thereon.

Vegetable gas had been obtained from oils which were separated from seeds and other oleaginous substances by pressure. It was discovered that gas might be distilled at once from the seeds, &c. without first separating the oil. Held, that assuming the invention to be new, it was such as might be the subject of a patent.

To a declaration stating that the plaintiff was the first inventor of a new manufacture, &c., and that the defendant had infringed his patent right, a plea that the invention was not a matter for which letters patent could by law be granted, does not put in issue the novelty of the invention.

(a) Before Cockburn, C. J., Coleridge, J., Wightman, J., Erle, J., Williams, J., and Crompton, J.

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The bill of exceptions stated that the issues came on to be tried before *Pollock*, C. B., at the sittings in London after Trinity Term, 1855, when the plaintiff gave in evidence certain letters patent of the 12th of November, 1850, "for improvements in the manufacture of gas," and also a specification filed in pursuance of the conditions of the said letters patent in which the improvements were stated to "consist in the construction of the apparatus used in making gas from oleaginous, fatty, resinous, tarry, or spirituous substances, and in the mode of working the apparatus," and the apparatus and the mode of operation were described: and the plaintiff also gave in evidence certain other letters patent of the 8th of May, 1852, "for improvements in the manufacture of gas," and a specification filed in pursuance of the condition thereof, which, after reciting that "heretofore in manufacturing gas from oils, oily or resinous matter, it had been usual to go through the costly process of obtaining the oils, &c. from seeds and other substances, and to use the same in a fluid or semifluid state," proceeded as follows:—

"Now my improvements consist in the direct use of seeds, leaves, flowers, branches, nuts, fruit, and other substances, and matters containing oil or oily or resinous matter, or other matter useful in the manufacture of vegetable gas.—The mode of using seed and constructing the apparatus used under this my patent in preparing gas, may be the same as the apparatus used in the ordinary mode of making gas with coal; but I prefer projecting the seed, &c. into a hot retort and subjecting it for a certain time to a proper heat, then withdrawing the expended residuum and again supplying the retort with another quantity of seed, and so on, be the same more or less, at one time. For the purpose of exemplification I give a plan of a retort," &c. "I claim for making gas direct from seeds and matters

herein named, for practical illuminations, or other useful purposes, instead of making it from the oils, resins or gums previously extracted from such substances."

The Lord Chief Baron directed the jury that the invention comprised in the letters patent of the 8th of May, 1852, was not a matter for which letters patent could by law be granted, and that they ought to find a verdict for the defendants on the issue joined on the eighth plea, so far as it related to the last mentioned letters patent. The counsel for the plaintiff excepted to the direction of the learned Judge, and contended that the same was a matter for which letters patent could by law be granted, and thereupon the jury gave their verdict for the defendant upon the eighth issue, so far as the same related to the said last mentioned letters patent and invention, and thereupon the jury was discharged as to the residue of the issues joined.

Webster (with whom was *Macnamara*), for the plaintiff.—At the time of the specification of the first patent, the mode of making gas from oils, tars, fatty or resinous substances, was so surrounded with difficulty that no apparatus for the purpose had been brought into general practice. The first patent was for improvements in the apparatus used for this purpose. Until the plaintiff invented the improvements described in the second patent, it had been usual, in the first instance, to go through the process of obtaining oil from the substances containing it, and then to inject the oil in a liquid state into a heated retort. The plaintiff's second patent is a claim for making gas by the direct use of seeds, leaves, flowers, branches, nuts and fruits, and other substances containing oil, or oily or resinous matter, or other matter useful in the manufacture of vegetable gas. That is a good subject-matter for a patent; it is a new manufacture. [Cockburn, C. J.—The plaintiff

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saves an intermediate process.] In *Crane v. Price* (*a*) it is said, that if the result is a new, better, or cheaper article, it is sufficient. Here the gas is necessarily cheaper, for the plaintiff's invention saves a costly process. *Starz v. De La Rue* (*b*) shews that an improvement in any part of a process is an improvement in the result. It is objected that no new process is described. [Erle, J.—In *Steiner v. Heald* (*c*), it was held that the application of a process previously applied for extracting garancine from fresh madder, to spent madder, which was a substance that had formerly been thrown away as useless, might, if the application involved any new discovery, be the subject of a patent. Cockburn, C. J.—No one doubted but that Heath's second invention of putting the carbon and manganese together in the pot with the iron, by which one of the processes for making his improved iron was saved, would have been a good subject-matter of a patent (*d*).] The invention is the more valuable because it is simple. A patent for the use of a new material in a combination may be good. It is like the case of Lord Dudley's patent for making iron with pit coal instead of charcoal (*e*).

Hindmarch (with whom was *J. Brown*), for the defendant.—The plea is, “that the invention was not a matter for which letters patent could by law be granted;” that means that it was not an invention within the exception in the 6th section of the 21 Jac. 1, c. 3. The plea raises the question of novelty, as well as whether the invention is a manufacture. Looking at the two specifications, and comparing them, the Court can now see that the invention is not new: *Bush v. Fox* (*f*). The first patent claims the use of the

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| (<i>a</i>) 1 Webst. P. C. 393; S. C. | C. B. 522. |
| 4 M. & G. 580. | (<i>e</i>) 1 Webst. P. C. 14. See also |
| (<i>b</i>) 5 Russ. 322. | Buck's Invention, 1 Webst. P. C. |
| (<i>c</i>) 6 Exch. 607. | 35. |
| (<i>d</i>) See Heath v. Unwin, 13 | (<i>f</i>) 5 H. L. 707. |

apparatus for making gas from resinous matter. Working under that patent would be an infringement of the second patent; therefore the invention described in the second patent is not new: *Tetley v. Easton* (*a*). [Cockburn, C. J.—The novelty of the invention is not put in issue by this plea. Coleridge, J.—It amounts to this: the novelty and utility of the invention being admitted, still this is not the subject-matter of a patent.] The plea raises every question; the effect of it is, that the conditions required by the statute to make a patent good do not exist. The plaintiff has described no new process, no new mode of operating upon matter, nothing but what is admitted to be old; and the question is, can the mere new application of the well known processes of dry distillation to a new matter be the subject of a patent? [Cockburn, C. J.—Is not the application of a known process to a new material a good subject-matter of a patent?] Not if the application is to a substance precisely analogous to the substances to which it had been previously applied. [Crompton, J.—Suppose a person discovered that instead of malting barley in the first instance he could malt it and make it into beer at the same time, and by a single process, might he not have a patent for that?] The doctrine laid down in *Crane v. Price* (*b*), and relied upon by the other side, has been repeatedly questioned, and particularly in *Dobbs v. Penn* (*c*).—He referred also to *Losh v. Hague* (*d*); *Regina v. Cutler* (*e*); *Kay v. Marshall* (*f*).

Webster was not called upon to reply.

COCKBURN, C. J.—We all think that the direction of the

(*a*) 2 E. & B. 956.

(*d*) 1 Webst. P. C. 202.

(*b*) 1 Webst. P. C. 393; S. C.

(*e*) 3 C. & K. 215; S. C.

4 M. & G. 580.

Macrory. Pat. Ca. 138.

(*c*) 3 Exch. 427.

(*f*) 5 Bing. N. C. 492.

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Lord Chief Baron was erroneous, and that there be a *venire de novo*. The patent claims the gas directly from seeds and other oleaginous substances instead of making it from oils. By this means the patent gets rid of one of two processes. Previously to the patent, gas had been obtained by a particular apparatus from oils, which were first separated from the substance containing them by pressure. The patentee has discovered that the first process may be dispensed with. That is a new invention, and the patent is sustainable if the invention is new.

Webster applied for costs, but the Court refused to make any order.

Venire de novo

OS. &c. &c.

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U & V & W &

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IN THE EXCHEQUER CHAMBER.*(Appeal from the Court of Exchequer.)***STOKES v. COX AND OTHERS.**

Nov. 29.

THIS was an appeal from the judgment of the Court of Exchequer, making absolute a rule to enter a nonsuit.

The case, as stated in pursuance of the provisions of the Common Law Procedure Act, 1854, sect. 39, set out the pleadings and the policy (which sufficiently appear in the report of this case in the Court below, ante, p. 320,) and proceeded as follows.—It was admitted by the defendants, that the buildings &c. were correctly described at the time when the policy was effected. It was also proved that at the time when the policy was effected there was no steam engine on the insured premises, but that there was in the boiler house, specified in the policy, a boiler with a furnace, &c. The construction and use of the premises remained unaltered from the date of the policy till June, 1855, when the plaintiff, without fraud, erected in part of

The plaintiff effected a policy of assurance in which the subject-matter was thus described:—
“On a range of buildings of three stories,” curriers’ shops, &c., “part of lower story of said building being used as a stable, coach-house and boiler-house: no steam-engine employed on the premises: the steam from said boiler being used for heating water and warming the shops.” N. B. The process of melting tallow

by steam in said boiler-house, and also the use of two pipe-stoves in said building, are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein nor in any building adjoining thereto.” The descriptions of insurance were fourfold, “Common,” “Hazardous,” “Doubly Hazardous,” and “Special Risks;” and the policy stated, that “when Special Risks are proposed, the most particular specifications of the property, and all circumstances attending the same, will be required; but all which Special Risks must be particularised on the policy, to render the same valid or in force.” One of the conditions indorsed on the policy was, that “if after the assurance shall have been effected, the risk shall be increased by” “any alteration of circumstances,” “and the particulars of the same shall not be indorsed on the policy by the secretary or some other agent of the Company, and a proportionate higher premium paid, if required, such insurance shall be of no force.” The insurance in question was a “Special Risk.” After the policy was effected the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam-engine, which was supplied with steam by the boiler mentioned in the policy. By the terms of the policy mills and manufactures having mill, steam or engine work were “Special Risks.” No notice of the erection or use of the steam-engine was given to the Insurance Company. The premises were afterwards destroyed by accidental fire, not attributable to the erection or use of the steam-engine. At the trial it was agreed by the parties that the jury should find, and the jury did find, that the risk of fire or damage thereby, was not increased by the erection or use of the steam-engine, or by the alterations in the insured premises. Held, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the policy was not avoided by the introduction of the steam-engine, and the use of the steam generated in the boiler to work it.

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the insured premises a steam-engine. Such steam-engine consisted of all the usual machinery and parts of a steam engine, except that no fresh boiler or furnace was erected, the same being worked solely by means of the steam generated in and by the said existing boiler and furnace, and conveyed thereto by means of a two inch iron pipe. No alteration was made in the boiler, except attaching the iron pipe thereto for the purpose of conveying the steam to the said engine; nor was any alteration made in the construction or use of the said furnace. No notice was given by or on behalf of the plaintiff to the Company of the said erection, use, or employment of the steam-engine; nor was any higher premium paid to the Company in respect thereof. On the 2nd of December, 1855, a fire occurred in the insured premises. It was admitted that the fire was purely accidental, and was in no way attributable to the erection or use of the engine. It was agreed between the parties that the jury should find, and they did accordingly find, that the risk of fire or damage thereby was not increased in point of fact by the erection and use of the said steam-engine, or by the alterations in the insured premises; and that the engine was not an erection of the like nature as respects the said policy, and the stipulations therein contained, as a stove, coakel, kiln or furnace. It was contended by the defendants, that irrespective of any question of fact to be found by the jury, the defendants were, upon the facts appearing at the trial, entitled to succeed, upon the ground that in point of law and with reference to the terms of the said policy, and the rates and conditions indorsed thereon, the risk must be taken to be increased within the meaning of the policy, and therefore that the policy was vacated by the erection and use of the said steam-engine, without notice to the Company. The learned Judge at the trial reserved leave

to the defendants to move for a nonsuit upon this point, and subject thereto the jury found a verdict for the plaintiff.

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*Keating* (with whom was *H. J. Hodgson*), argued for the plaintiff (*a*).—The rule to enter a nonsuit should have been discharged. The question turns upon the construction of the particular policy. The Court of Exchequer has departed from the principle laid down in *Sillem v. Thornton* (*b*), though they professed to follow it. Here the jury found, by the consent of the defendants, that there was no increase of risk. *Martin*, B., in his judgment in the Court below, referred to the statements in the policy, that no steam-engine was employed on the premises; that the steam generated in the boiler was used for heating water, warming the shops, and in the manufactory, and that its further use was allowed for melting tallow in the boiling-house: but considering the question apart from the 7th condition, these statements are in a part of the policy which is not the warranty,—which in fact immediately follows them in these words: “but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein, nor in any building adjoining thereto.” The description in a policy does not amount to a warranty where in the same policy there is an express warranty. Previously to the decision in *Sillem v. Thornton* (*b*), there was no case in which it had been held that the *description* of the premises amounted to a warranty, so that no change could be made if the risk was thereby increased. *Pim v. Reid* (*c*) shews the general nature and effect of the description in a policy. *Tindal*, C. J., there stated, that on general principles a policy is not avoided by an alteration of the trade carried on upon the

(*a*) Before *Cockburn*, C. J.,      (*b*) 3 E. & B. 868.  
*Wightman*, J., *Williams*, J., *Crompton*, J.,      (*c*) 6 Man. & G. 1.  
*Crowder*, J., and *Willis*, J.

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premises. In *Sillem v. Thornton* (*a*), at the time when the policy was effected the description of the premises was incorrect: the alteration by the addition of the third story had taken place before the date of the policy. [Willes, J.—Any opinion expressed by the Court in *Sillem v. Thornton*, as to the effect of an alteration in the state of the premises insured after the date of the policy, must be extrajudicial.] Where the parties might have annexed conditions to their agreement had they thought fit, but have not done so, such conditions ought not to be implied. If that rule did not apply in cases of this description, it would be impossible for persons assured to know what is a warranty, and what is not. The rule for construing documents of this kind is thus stated by Lord St. Leonards, in *Anderson v. Fitzgerald* (*b*). “Every Court of justice should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that upon the ordinary construction of language he is safe in the policy which he has accepted.” Now it is a general rule, applicable to all contracts, that the law will not imply a warranty where there is an express warranty. Thus, in *Budd v. Fairmaner* (*c*) where a receipt was given “for a grey four-year old colt warranted sound,” it was held that the warranty was confined to soundness. It has been suggested that there is an alteration in the nature of the risk, but that is provided for by the 7th condition. The defendants pleas are founded upon the 7th condition, each of them alleging an increase of risk, but neither of them is proved. The Court below considered it sufficient if so much of the pleas was proved as constituted a defence. But each plea is entire, and no part of it is proved. [Cock-

(*a*) 3 E. & B. 868.

(*b*) 4 H. L. 484.

(*c*) 8 Bing. 48.

burn, C. J.—Although the plaintiff states that no steam-engine is on the premises, and pays on that footing, he claims to be insured against the risk occasioned by it. The conditions state, that if there is a steam-engine on the premises that "constitutes a special risk." *Crowder*, J.—This insurance was on "a special risk," and it is found not to have been increased by the addition of the steam-engine.] The policy contains a statement of the different classes of risk, to enable the assured to make a proposal. There is nothing in that part of the policy relating to changes which might take place subsequently to the making of the policy. The conditions are the only part of the policy which contain any stipulations as to a subsequent alteration of the circumstances or the risk. [*Willes*, J.—Is not the 7th condition the governing condition for the purposes of these pleas?] The Lord Chief Baron said that *risk* did not mean *danger* but the circumstances which gave rise to it; but an alteration in the mode of using the premises does not avoid the policy. In *Billings v. The Tolland County Mutual Fire Insurance Company* (*a*), *Waite*, J., in delivering the judgment of the Court, said:—“The first exception is, that the words in the policy ‘all the above barns are used for hay, straw, grain unthrashed, stabling, and shelter,’ are a warranty that the buildings should be used in that manner and no other; but we do not so understand the language of this instrument. The clause was inserted merely for the purpose of giving a description of the buildings insured, and not to limit their use or to deprive the plaintiff of the enjoyment of his property in the same manner as buildings of that description are generally used and enjoyed, &c. It was indeed competent to the defendants in the policy to limit their liability, and prescribe in what manner the buildings, during the

(*a*) 20 Day. (American) Connecticut Reports, p. 139.

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continuance of the policy, should be used, &c. To some extent this has been done in the present case. It was provided 'that no ashes should be kept in any part of the buildings.' The keeping of ashes contrary to that provision would destroy the obligation of the contract. But this provision differs materially from the former: one is a prohibition, the other a description, or at most a warranty that the buildings, at the time they were insured, were such as they were described to be in the policy, &c."

Whately (for the defendant).—If there be an express warranty as to a particular matter, it may be admitted that no warranty can be implied as to that matter. The description of risks insured against by this office vary greatly. The statement—"the steam from the boiler being used for heating water and warming the shops," and the allowed use of steam for other specified purposes, excludes the use of it for a steam-engine. If a ship is insured, and deviates from the voyage upon which she is insured, that vitiates the policy. [Wrightman, J.—There the insurance is an insurance against the perils of the seas on *that voyage*. Cockburn, C. J.—Your argument is, that the Company have pointed out that the erection of a steam-engine is a special risk, and it does not lie in the mouth of one who has effected such a policy to say that the addition of a steam-engine is not an additional risk.] The doctrine supposed to have been established by *Pinn v. Reid* (a) was questioned by the Court of Queen's Bench in *Sillem v. Thornton* (b). [Wilkes, J.—In *Barrett v. Jeremy* (c) it was suggested by counsel on the argument that, independently of the conditions, if it appeared that, by carrying on a hazardous trade after the date of the

(a) 6 Man. & G. 1. (b) 3 E. & B. 568, 587.
 (c) 3 Exch. 535. See p. 541.

policy, the risk was increased and a fire was occasioned by the circumstances creating the increased risk, the insurer might not be liable; but that if a person exhibited fireworks, or had a chemical laboratory for the purpose of experiments, that would not affect his policy if the fire happened from some independent cause. I recollect that the present Lord Chancellor and Lord *Wensleydale* assented to that proposition. On that ground the terms of the judgment in *Sillem v. Thornton* (a) have been canvassed.] The 7th condition is cumulative, and does not merely qualify the circumstances under which steam may be applied to other purposes than those expressly allowed. In *Anderson v. Fitzgerald* (b) it was held that the question was not as to the materiality, but as to the truth of statements proving the basis of the contract. [Wightman, J.—That case did not turn upon the question of increase of risk. There was a condition that the representation made in effecting the insurance should not be untrue.] If the circumstances of the risk are altered, the Company are to have an opportunity of determining whether they will continue the insurance.

Keating, in reply.—The policy is effected on a special risk. [Cockburn, C. J.—Each of these circumstances constitutes a special risk in itself.] The only part where there is any reference to an alteration in the state of the premises after the date of the policy, is in the 7th condition. By agreement the jury have found that what was done did not increase the risk; indeed it was merely the machinery of the steam engine that was put up. The permission to use steam for a particular purpose does not exclude the use of it for any other purpose, if the risk is not thereby increased. Assuming the use of it to be hazardous, it may nevertheless be used for the purposes named without notice, notwithstanding

(a) 3 E. & B. 868.

(b) 4 H. L. 484.

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standing the 7th condition. If the Court construes a policy, which contains an express warranty, as containing also an implied warranty, they will alter the contract of the parties.

COCKBURN, C. J.—We are all of opinion that the decision of the Court of Exchequer must be reversed, and the rule to enter a verdict for the plaintiff made absolute. It is unnecessary for us to express any opinion as to implied warranty in a policy not containing such a clause as the 7th condition in this policy. In our judgment, the effect of the 7th condition is restrictive. All that an insurer is called upon to do, is, in the event of an increase of the risk,—and in that event only, to give notice to the insurance company of the alteration of circumstances. Here it is found as a fact that there was no increase of risk; therefore there was no necessity to give notice.

Rule absolute to enter a verdict for
the plaintiff.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

GRAHAM and Another, Assignees of G. ROUGEMONT, a Nov. 29.
Bankrupt, v. THE VAN DIEMEN'S LAND COMPANY.

EROR on a bill of exceptions.—The declaration, (which is set out, 11 Exch. 101), was by the plaintiffs, as assignees of Rougemont a bankrupt, against the defendants, for refusing to enter on the register of shareholders the names of the plaintiffs as proprietors of 157 shares in the defendant's undertaking, which had belonged to the bankrupt before his bankruptcy.

Pleas, (inter alia.) Thirdly.—That the plaintiffs did not become entitled to the shares as the owners thereof. Fourthly.—That before and at the time of the bankruptcy, the shares were of no value; and that the plaintiffs did not accept or take the shares as part of the estate of the bankrupt; but refused to accept or take the same as part of his estate, and elected to waive, abandon and reject them,

By the charter of The Van Diemen's Land Company it was provided, that there should be held in each year a general meeting at a particular time. Special general meetings might also be called, of which notice was to be given by advertisement. No business was to be transacted at any special general meeting besides the business for which it was called. By the 14th section of the Company's

Act, 6 Geo. 4, c. 39, no advantage is to be taken of the forfeiture of shares, unless the same shall be declared to be forfeited at some general or special general meeting. A meeting, after the time named in the charter for the annual general meeting, was called by advertisement "to receive the annual report; to declare the forfeiture of certain shares, &c., and on other business; and the Company thereby further gave notice that the said general meeting was made special for the purpose of electing directors." Held, that such meeting was competent, as a special general meeting, to declare the shares forfeited.

By the Van Diemen's Land Company's Act, 6 Geo. 4, c. 39, s. 14, no advantage is to be taken of the forfeiture of any shares until after thirty days' notice shall have been given to the owner or owners thereof. By s. 12, in cases where the holder of any share shall become bankrupt, &c., an affidavit shall be made and delivered to the clerk of the Company that he may register, &c., and until such affidavit shall have been delivered, no such person shall be entitled to sell or assign such share or to claim any dividend. R., the proprietor of shares, having become bankrupt in 1847, his assignees took no steps to procure their names to be placed on the register till 1853. Calls were made of which the assignees had notice. In 1851 the shares were declared forfeited by the Company. Notice of such forfeiture was served upon the bankrupt, his name being at the time on the register as owner of the shares. Held, that such notice was properly served upon the bankrupt.

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and did waive, abandon and reject to the bankrupt the said shares and all their right, title and interest therein. Eighthly.—That thirty days' notice of forfeiture was given by the directors of the Company, under the hand of the clerk of the Company, to the owners of the said shares, as required by the Act. Ninthly.—That before and at the time of the delivery of the affidavit and of the tender, the said shares had been and were duly forfeited according to the tenor and provisions of the statute in the declaration mentioned.

The bill of exceptions set forth that, at the trial before *Pollock*, C. B., at the sittings in London after Trinity Term, 1855, the plaintiff gave in evidence the fiat in bankruptcy, and the appointment of the plaintiffs as assignees in 1847. That at the time of the bankruptcy the bankrupt was the owner of 157 shares of 100*l.* each, whereof 23*l.* were paid up. The bankrupt knew of the calls as they occurred, and informed the plaintiffs of them. The defendants, on the 14th of June, 1849, addressed and sent to the plaintiff Graham, as official assignee of the bankrupt, the following notice, signed by their clerk:—

“Sir,—Annexed is a copy of a notice in virtue of which you are required to make a payment of one pound on each share standing in your name in the books of the Company, &c.

“The Directors, &c., give notice that a call of one pound per share is made on the proprietors of stock in this Company, &c.

“Amount of payment, &c., 167 shares, at one pound each, 157*l.*”

The letter and notice were received by the plaintiff Graham. On the 16th of February, 1853, the plaintiffs delivered to the clerk of the defendants an affidavit of the bankruptcy, and a request to the defendants to enter their names as assignees on the register as proprietors of 157 shares of

which the bankrupt was owner at the time of his bankruptcy. The defendants, in answer, stated that there were no shares standing in the name of the bankrupt. The plaintiff Graham proved that he tendered the amount of all calls due, and interest, and that he never refused to accept the shares. He stated that he knew of the forfeiture of the shares about the time it occurred.

The plaintiffs also put in evidence the royal charter incorporating the defendants, which was made part of the bill of exceptions. The charter contained the following clauses with respect to the general and special meetings of the Company:—

“There shall be held in each year one general meeting of the said Company, that is to say, on the first Tuesday in the month of March in each year, or within fourteen days next after, of which meeting fourteen days’ notice, at the least, shall be given by advertisement in the *London Gazette*, &c.”

“The directors of the said Company shall and may at any time or times, and for such purpose or purposes as they may think proper, call a special general meeting or meetings of the said Company, of which notice shall be given by advertisement, &c.”

“No business shall be transacted at any special general meeting of the said Company besides the business for which it shall have been called.”

The defendants proved that calls were made, payable in 1848, 1849, and 1850, and that due notice of these calls was given in pursuance of the defendants’ act of parliament, but that neither of these calls was paid on the 157 shares. On the 7th of February, 1851, notice was given by the defendants, by advertisements, &c., “that a special general meeting would be holden for the purpose of declaring

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forfeited certain shares upon which calls remained unpaid." The bankrupt attended, and addressed the meeting, and the consideration of forfeiture was postponed until the general meeting in March. On the 13th of March notice of an annual general meeting of proprietors was given by the directors by advertisement, as follows:—

"Van Diemen's Land Company, &c.

The Court of Directors of the Van Diemen's Land Company hereby give notice, that the twenty-sixth annual general meeting of proprietors will be holden at this office on Monday the 31st instant, at one precisely, to receive the annual report, to declare the forfeiture of certain shares on which calls are in arrear, and on other business. And the Court hereby give further notice, that the said general meeting is made special for the purpose of electing four directors, &c."

At the meeting which accordingly took place on the 31st of March, the chairman informed the meeting that the directors had felt it their duty to propose the forfeiture of certain shares, and amongst others those "lately George Rougemont, Esq., " which were declared forfeited accordingly.

At the twenty-seventh annual general meeting of the proprietors, held March 12, 1852, the proceedings of the general meeting in 1851 were confirmed. The defendants addressed to the bankrupt a notice, under the hand of their clerk, dated May 20, 1852, "That at a general Court of Proprietors, held the 31st of March, 1851, it was amongst other things resolved, that, in consequence of your having neglected to pay the calls on the shares standing in your name for the space of three calendar months, &c., the same shares &c. should be absolutely forfeited, &c., and the same were thereby declared forfeited accordingly, and you are

thereby declared disfranchised, &c., but no advantage will be taken of such forfeiture until after the expiration of thirty days from the date of this notice."

This notice was delivered to Messrs. Peile, Son, and Murch, the attorneys of the bankrupt and of the plaintiffs, who accepted service thereof for the bankrupt; but stated that his interest had vested in his assignees. A clerk had previously called with the notice at the last known place of abode of the bankrupt, and was referred to Messrs. Peile.

The learned Judge directed the jury that the meeting, held on the 31st of March, 1851, was, either as a general meeting, or as a special general meeting, competent to declare the shares forfeited, and that the proceedings of the meeting of the 12th of March, 1852, operated to confirm the proceedings of the 31st of March, 1851, if they wanted confirmation; and also as a declaration of forfeiture of the shares, if a declaration was required; and that if the jury believed that the notice of the 20th of May, 1852, not only found its way to the bankrupt, but also to the plaintiffs, having been delivered to their attorney, the shares were legally forfeited according to the defendants' act of parliament, and that the issues on the eighth and ninth pleas should be found for the defendants. And he also told the jury that if they thought that the plaintiffs never accepted the shares, the plaintiffs were not entitled to maintain the present action; and that if the plaintiffs, with knowledge that notice had been sent to the bankrupt that the shares were forfeited, did not come forward and claim them; and if, with reference to these circumstances, they thought that a reasonable time had elapsed, and the plaintiffs had abandoned their interest in the shares, they ought to find the third and fourth pleas for the defendants.

The counsel for the defendants excepted to this ruling.

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Hoggins (with whom was *J. H. Hedges*) argued for the plaintiffs (a).—After the notice of the 14th of June, 1842, the defendants could not declare the shares forfeited without notice to the plaintiffs. The fourteenth section of the Company's Act (b), provides that no advantage shall be taken of any forfeiture until after thirty days' notice to the owner or owners thereof. The object of that provision is to enable the person entitled to the shares to come in, within thirty days, and save the forfeiture. This notice did not give the assignees the benefit of the option which the statute secures to them. The notice is to be left at the usual or last known place of abode of the owner; therefore the mere fact that the plaintiffs acquired a knowledge of the declaration of forfeiture is not sufficient.

Secondly, according to the provisions of the charter, the meeting of March 31, 1851, was not a general meeting, because, by the charter, such meeting could only be held on

(a) Before *Cochrane*, C. J., *Coleridge*, J., *Wighton*, J., *Erie*, J., *Williams*, J., *Crompton*, J., *Willis*, J.

(b) 6 Geo. 4, c. 33, s. 14, "that if any subscriber or any proprietor or proprietors of any share or shares in the capital stock of the said Company, his, her, or their executors, administrators, successors, or assigns, shall neglect or refuse to pay his, her, or their part or portion of the money to be called for by the directors as aforesaid, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the appointed time of payment, then and in every such case such person or persons so neglecting or refusing

shall absolutely forfeit all his, her, or their share or shares in the capital stock of the said Company, and all profits and advantages thereof." "But no advantage shall be taken of such forfeiture of any share or shares until after thirty days' notice shall have been given by the directors of the said Company, under the hand of the clerk of the said Company, to the owner or owners thereof, by notice in writing, left at his, her, or their usual or last place of abode, nor unless the same shall be declared to be forfeited at some general or special general meeting of the proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen."

the first Tuesday in the month of March, or within fourteen days after. A special general meeting can only transact the business for which it is called. The meeting here was only *special* for the purpose of electing directors; it was not made a special meeting for the purpose of forfeiting shares. [*Coleridge* J.—Is not a special general meeting merely a general meeting for certain objects specified? Suppose notice is given of a general meeting to do certain things, is not that a special general meeting?] The interest of the plaintiffs was not affected by the forfeiture: it only operated upon such interest as the bankrupt might have had. There is no rule of law which rendered it necessary for the plaintiffs to declare that they had adopted the shares within a reasonable time: *Gibson v. Carruthers* (*a*). [*Crompton*, J.—What was said by *Maule*, J., when this case was before us on a former occasion, as to the question to be submitted to the jury (*b*), was no part of the judgment; it was only a kind of advice given by that learned Judge.] If the plaintiffs had been asked to accept the shares and had refused to do so, the case might have been different. [*Cockburn*, C. J.—Suppose a registered shareholder becomes bankrupt, and his assignees do nothing with respect to the shares, must the company wait for ever before they can forfeit them?]

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Hugh Hill (with whom was *Unthank*), for the defendants.—The company were not obliged to give any notice to the assignees. These shares being property of the bankrupt which would be a charge to the creditors, the assignees had a mere right of election: *Turner v. Richardson* (*c*); per Lord *Ellenborough*; *Hanson v. Stevenson* (*d*). That right not having been exercised, the property in the shares

(*a*) 8 M. & W. 321.

(*c*) 7 East, 335.

(*b*) See 11 Exch. 113.

(*d*) 1 B. & Ald. 303, 307.

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remained in the bankrupt: *Copeland v. Stephens* ¹. The estate could not be in abeyance. [Erie, J.—As to households it is *via idem*. Is the rule the same as to other property?] The rule is the same with respect to shares in incorporated companies as with respect to leases: *South Staffordshire Railway v. Barnsley* ². In *Lawrence v. Knotties* ³, it was held that the assignees were entitled to elect to take an unexecuted contract. As to *Gibson v. Carruthers* ⁴, there is a distinction between that case and those where something remains to be done which forms a condition precedent to the vesting of the interest in the assignees. Notice is to be given to the owner, that is to the bankrupt, for these cannot be two owners: the ownership was never out of the bankrupt, and his name appeared on the register as owner at the time of the insolvency.—He also referred to *Wright v. Fairfield* ⁵.

Hoyges replied.

Cockburn, C. J.—We are all of opinion that there must be judgment for the respondents. It is only necessary to consider two exceptions which were taken to the ruling of the learned Judge. First, that the meeting was not one competent to declare the shares forfeited, on the ground that it was an annual general meeting not held at the period prescribed by the charter. But we think that this meeting was competent. Without deciding whether that portion of the charter may not be treated as directory, as the advertisement specified the purposes for which the meeting was to be held, and one of those was the question of inclosure, the meeting was competent as a special general

(a) 1 B. & Adm. 293.

(b) 5 Exch. 129.

(c) 1 Bing. S. C. 274.

(d) 3 M. & W. 321.

(e) 2 B. & Adm. 727.

meeting. Secondly, that the notice was not such as the act of parliament declares shall be given before advantage can be taken of any forfeiture. We are of opinion that sufficient notice was given. Notice was given to the bankrupt, not to the plaintiffs, who were his assignees. At the time of the forfeiture the bankrupt's name stood as owner of the shares. The Act requires notice of forfeiture to be given to the owner. The person on the register is to be taken to be the proprietor; and there are provisions that, in case of marriage or a transfer of the shares, an affidavit shall be made, and the necessary alteration made on the register. No call can be made except upon shareholders who are upon the register. Without entering into the question decided in *The South Staffordshire Railway Company v. Burnside* (*a*), it is sufficient to say that the registered shareholders are the only shareholders for the purposes of the act, and that notice of the forfeiture was properly served upon the bankrupt.

Judgment affirmed (*b*).

(*a*) 5 Exch. 129.

(*b*) The following clauses in the Act, 6 Geo. 4, c. 39, relate to the registration of transfers. Sect. 6. The Company, &c., "shall cause the names and designations of the several persons who have subscribed for, or may at any time hereafter be entitled to a share or shares in the capital stock of the said Company, with the number of such shares, &c., to be entered in a book or books to be kept by their clerk; and after such entry a certificate shall be delivered, &c., and such certificate shall be admitted in all Courts whatsoever as evidence of the title of such proprietor," &c.

By s. 9. Shares may be transferred, transfers to be registered, "and until such transfer be registered, &c., no purchaser, &c., shall receive any interest," &c., "and shall not be entitled to vote at any meeting as proprietor, until six months after such transfer shall have been registered," &c., and "when and so often as the transfer, &c., shall have been duly registered, &c., the former proprietor, &c., shall thenceforth be acquitted," &c.

By s. 11. When rights accrue in case of marriage an affidavit shall be delivered to the clerk of the Company "before such person shall be entitled to sell such

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share or receive dividends."

By s. 12. In cases where the holder of any share "shall die or become insolvent or bankrupt, or go or be resident out of the kingdom, or shall transfer his or her right or interest to some other person or persons, &c., and no register shall have been made of the transfer with the clerk of the said Company, it may not be in the power of the said Company to know who is or are the proprietor or proprietors, &c., in order to give, &c., notice of calls, &c., and to maintain any action, &c." Be it therefore enacted,

"that in all the cases aforesaid, where the right, &c., shall pass from the original subscriber, &c., to any other persons, &c., by any other legal means than by a transfer, &c., an affidavit shall be made, &c., and delivered to the clerk, &c., that he may enter and register the name, &c., of such proprietor, &c., and until such affidavit shall have been so delivered or left with the said clerk as aforesaid, no such person or persons shall be entitled to sell or assign such share or shares, or to claim payment of any interest or dividends in respect thereof."

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

Nov. 26.

SIR JAMES GRAHAM, Bart., v. EWART.

THIS was a proceeding in error, upon the judgment of the Court of Exchequer, upon the special case stated for the opinion of that Court in *Graham v. Ewart* (a).

The plaintiff's father was lord of a manor, within which was a stinted pasture, and as such lord was owner of the soil and entitled to all mines and minerals and to other rights royalties, liberties, and privileges upon and over it, and to the exclusive right of hunting, shooting, fishing, and fowling; but there was no right of free warren. The plaintiff's father and other persons were owners of tenements within the manor, and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates and to rights of common of turbary. In 1811 an act of parliament was passed for enclosing the pasture. This Act recited that the plaintiff's father was lord of the manor; that there was within the manor the said stinted pasture; that he as lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and other privileges in and over it; and that he and other persons were owners of tenements within the manor and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates on it and to rights of common of turbary and other rights therein. The Act then recited that it would be of benefit to the persons interested if the

(a) See the case, 11 Exch. 326.

Hugh Hill (*Manisty* with him) argued for the plaintiff in last Easter Vacation (a) (May 12).—With respect to the Clint allotment, the judgment of the Court below proceeded on the authority of *Greathead v. Morley* (b), but that case is distinguishable, or if not, it cannot be supported. (He then referred to the preamble of the Act for inclosing Bailey Hope Pasture, 51 Geo. 3, and the sections referred to on the argument in the Court below (c).—The exclu-

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pasture was divided and allotted severally amongst the persons entitled to cattlegates thereon, and proceeded to appoint commissioners for that purpose. The Act directed the commissioners to allot to the plaintiff's father as lord of the manor, his heirs and assigns, one twelfth part of the pasture "in view of, and in full recompence and satisfaction for all his right and interest, as lord of the said manor, of, in, and to the soil of the residue of the said stinted pasture." The Act then directed that the residue of the pasture should be allotted to the plaintiff's father and other persons entitled to cattlegates, rights of common, and other rights upon it, and the allotments were declared to be freehold. The Act reserved to the plaintiff's father, and the lords of the manor for the time being, all mines under the pasture, and full powers were conferred on them for working the mines. The Act also provided that nothing therein contained should prejudice, lessen, or affect the right, title, or interest of the plaintiff's father, his heirs, &c., lords of the manor for the time being, in or to any seignories, royalties, rights, or services incident or belonging to such manor; but they should and might at all times thereafter hold and enjoy the same respectively, and all rents, services, fines, courts, &c., "and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture and every part and allotment thereof; and all other seignories, royalties, and privileges to the lords of the said manor for the time being incident and belonging (other than and except those which were expressly declared to be barred, destroyed, and extinguished by that Act) in as full, ample, and beneficial a manner as they respectively could or might have held and enjoyed the same in case this Act had not been passed." In 1814 an allotment in the pasture was made to the plaintiff's father in respect of an estate called Woodside, and an allotment called the Clint allotment was made to J. E. in respect of a customary tenement. In 1823, the plaintiff's father agreed with the defendant's grandfather to exchange the Woodside allotment for an allotment belonging to the latter. This exchange was effected by two deeds, dated the 1st of February, 1823. One of these deeds was made between the plaintiff's father and the plaintiff of the one part, and J. E. of the other part; and by it the former conveyed to the latter the Woodside allotment with a reservation to them and the lords of the manor of the mines and minerals, and also the liberty and privilege of hunting, hawking, coursing, shooting, fishing, and fowling over the said tenement, &c. By the other deed, which was between the same parties, J. E. conveyed to the plaintiff's father the land by him agreed to be given in exchange for the Woodside allotment, and he granted to the plaintiff's father and the lords of the manor the same right of sporting, and he covenanted to allow them to proceed against trespassers in his name. In 1829 the Woodside allotment came by descent to the defendant's father, and in 1846 he purchased the Clint allotment. Since 1831 the owner of these allotments sported over them, claiming to do so as of right, and the plaintiff during the same time exercised the right of shooting concurrently. In 1852 the defendant's father claimed the exclusive rights of sporting over the Woodside and Clint allotments, and the defendant did so with his authority.

*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the plaintiff had the exclusive right of sporting over the Clint allotment. (*Erle, J. and Willes, J.*, dissentientibus).

*Held* also, (affirming the judgment of the Court of Exchequer), that the plaintiff had the exclusive right of sporting over the Woodside allotment.

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| (a) Before Coleridge, J., Wight-<br>man, J., Cresswell, J., Erle, J.,<br>Crompton, J., Crowder, J., and<br>Willes, J. | (b) 3 Man. & G. 139.<br>(c) See 11 Exch. 332, 333,<br>334, 335. |
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sive right of shooting, &c., over the Clint allotment is reserved to the plaintiff, as lord of the manor, by the proviso in the 51 Geo. 3. The language of the statute is not strictly accurate, for in describing the lord's right of turbary, it treats it as a right irrespective of the ownership of the soil. The object of the legislature was to protect every right of the lord compatible with the improved cultivation of the surface. The Act is a bargain between the lord and his tenants, sanctioned by the legislature; the lord ceding everything on the surface to be used by the tenants; but reserving to himself his former rights. Even if it had been a custom to exclude the lord from the common during a portion of the year, that would have been good; 1 Wms-Saund. 353, note 2. The right of shooting, &c., may be the subject of a grant, for it is a license of profit à prendre; *Wickham v. Hawker* (a), *Doe d. Douglas v. Lock* (b), *Tyson v. Smith* (c). The language of inclosure Acts should not be read according to its strict technical signification but in order to carry out the intention of the parties. For the purposes of those Acts the legislature treats these interests of the lord as *rights*, though in a legal view they cannot exist as such, but are only modes of enjoyment of his own property; *Arundell v. Viscount Falmouth* (d), *Askew v. Wilkinson* (e), *Lloyd v. Earl of Powis* (f). The manifest intention was that the lord should continue to enjoy all the rights which had hitherto been exercised by him. In *Greathead v. Morley* (g), the words of the saving clause were, "with *free warren* and liberty of hunting, hawking, fishing, and fowling;" and there was nothing to indicate an intention on the part of the legislature to reserve to the lord any right of sporting except that annexed

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| (a) 7 M. & W. 63.      | (e) 3 B. & Adol. 152. |
| (b) 2 A. & E. 705.     | (f) 4 E. & B. 485.    |
| (c) 9 A. & E. 406.425. | (g) 3 M. & G. 139.    |
| (d) 2 M. & Sel. 440.   |                       |

to the manor as free warren, and which may exist in gross. The language of this proviso is different, and moreover the case finds, as a fact, that there was no right of free warren. The principle in these cases is thus stated by *Parke*, B., in *Earl of Rosse v. Wainman* (*a*):—"The object of the Act was to give the surface for cultivation to the commoners, and to leave in the lord what it did not take away for that purpose." In *Pannell v. Mill* (*b*), the exception was only of "all royalties." In *Hill v. Grange* (*c*), the Court construed the word "appertaining" as meaning "usually occupied," in order to give effect to it; so here the Court will read the language of the proviso in that sense which the parties intended.—With respect to the Woodside allotment the plaintiff relies upon the judgment of the Court below.

*Unthank*, for the defendant.—The defendant does not dispute the authorities as to the construction to be given to the term "*rights* of the lord" when used in inclosure Acts. Strictly speaking, the lord cannot have a right of common in his own soil, though, in common parlance, he is said to have such right. It is the same with respect to the right of sporting. No doubt the object of the Act was to promote the cultivation of the soil; but the right here claimed is not calculated to advance that object. One-twelfth of the pasture is allotted to the lord "in lieu and full recompense and satisfaction" for all his right and interest as lord of, in, and to the soil. By that clause every right incident to the ownership of the soil was extinguished. Then the residue of the pasture is allotted amongst the lord and commoners. Unless the subsequent clause had excepted the mines and minerals, the right of the lord to them would also

(*a*) 14 M. & W. 872.

(*b*) 3 C. B. 625.

(*c*) *Plowd.* 170 *a.*

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have been extinguished. [*Coleridge*, J.—The saving clause excepts all rights “which are not *expressly* declared to be barred, destroyed, and extinguished by the Act.” Is then the right of sporting *expressly* declared to be barred?] If the Act has not that effect there is no reason for inserting the clause reserving to the lord his right to the mines and minerals. The rights reserved are not those incident to the soil, but separate rights belonging to the lord as lord. In *Greathead v. Morley* the exception was more extensive than in the present case.

With respect to the Woodside allotment, the effect of the deeds is to grant to the plaintiff not an exclusive, but a mere personal right of shooting over that allotment. Where an exclusive right is intended the parties have so expressed themselves, as in the case of the exception as to mines. If the parties had intended that there should be an exclusive right of sporting, it would have been unnecessary to provide for proceedings against trespassers being taken, or notices given, in the name of Ewart.

Per **CURIAM**.—We are all of opinion that with respect to the Woodside allotment the judgment of the Court below ought to be affirmed.

Hugh Hill replied, as to the Clint allotment.

Cur. adv. vult.

The Court having differed in opinion, the following judgments were now delivered:—

ERLE, J.—With respect to the Clint allotment, I am of opinion that the plaintiff is not shewn to have either an exclusive or a concurrent right of sporting thereon; my

answer, therefore, to the two first questions is in the negative, and the third question does not arise as to this close.

The point is whether the clause in this inclosure Act, saving rights incident to the manor from being defeated by the Act, is a grant of those rights by a freeholder allottee thereunder to the lord. The Act in question recites, that Sir James Graham, as lord of the manor, is owner of the soil and entitled to the minerals, and to other rights, royalties, liberties, and privileges in the land to be inclosed. Then one-twelfth of the land is to be allotted to the lord in lieu of, and full compensation for, all his right and interest as lord of the manor in the soil of the residue; and the residue is to be allotted to allottees, and to be freehold to all intents and purposes.

By these enactments the rights incident to ownership of the soil are expressly barred and extinguished; the right of taking game by hunting and shooting being one of the rights of that ownership.

The Act treats the minerals as a separate tenement from the surface, and enacts that the right to them shall be in the lord, with liberty to work, making compensation for damage to the surface. Then the saving clause enacts, that nothing therein shall lessen the right of the lord to any seigniories, royalties, rights or services incident to the manor, but that the lord shall enjoy the same, and all rents, services, fines, forfeitures, courts, minerals with power of winning the same, and also right of hunting, shooting, fishing, and fowling over every part of every allotment, and all other seigniories, royalties, and privileges to the lords of the manor incident or belonging, other than those expressly declared to be barred, in as ample a manner as they might if the Act had not passed. The plain meaning of this clause is to save to the lord rights incident to the manor overfreeholds within the manor, if such there were

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existing when the Act passed: and no construction is suggested according to which it could operate as a grant by the allottees to the lord of the property in every beast, bird, and fish in their allotments which might be the object of hunting, fishing, or fowling, with liberty to the lord or his servants to pursue them at all times into cultivated inclosures as freely as the lord had done over his own wastes.

The right is not claimed by construing the words of the Act, but by assuming that the legislature and the parties were ignorant of the law, and had an intention different from that expressed by the words, and that, therefore, a clause must be imagined which would effectuate that intention. Not only is this process contrary to legal rules of construction, but the assumption of fact seems to me to be contrary to the effect of the facts stated in the case.

The Act is clear in compensating the lord for the ownership of the soil which he gives up, and in vesting the soil, so given up, as a freehold to all intents in the allottees,—subject only to the clause enacting that the lord shall have the minerals with the right of working, making compensation.

The Act also shews that the lord claimed the possibility of rights, royalties, and privileges incident to the manor of which the existence as well as the extent was uncertain, and these are to remain unaltered, neither established nor defeated by the Act. Thus it saves rents and services, fines and forfeitures, though it is uncertain whether any thing on these accounts is to be due to the lord in respect of freeholds. Thus also it saves the lord's right to minerals, with a power of winning them, apparently without compensating surface damage, perhaps intending some manorial claim to minerals such as the lord set up in *Townley v. Gibson* (a). But though the Act by this clause saves un-

(a) 2 T. R. 701.

certain rights to the minerals, by another clause it created a certain right to the same minerals, with such appropriate powers and limitations as make it clear that the law upon ownership of minerals was well understood. Thus also it saves "right of hunting, shooting, fishing and fowling." And if there were no extrinsic evidence beyond the Act, this clause according to the common rule ought to be construed to relate to a claim of an uncertain manorial right of sporting. But there is extrinsic evidence that such a claim existed, for a grant of the game in the Woodside allotment, parcel of the same manor, to the lord, contained in the deeds of exchange, is stipulated to be without prejudice to the lord's right of free-warren. Now, as it is a fact also set out in the case, that the lord had no right of free-warren in the manor, this stipulation in the deeds has the same operation as the saving clause in the Act: no right is created; but if any right should be found to be capable of proof it is preserved. It is clear from the Act and the case, that the lord was willing to have right of sporting over the allotments, but I can discover no legal reason for assuming that the allottees intended to grant such a right.

The authorities are decisive to support this construction. In *Greathead v. Morley* (a), *Tindal*, C. J., with the Court of Common Pleas, adjudicated on a saving clause to the same effect as that now in question, that it had no operation to create any right, but it only saved those incorporeal rights which were incident to the manor when the Act passed. In *Doe d. Lowes v. Davidson* (b), Lord *Ellenborough* and the Court seem to be of the same opinion, when they adjudicate that the words, "in as ample a manner as if the Act had not been made," in a saving clause, cannot confer any new right, but reserve only such as the lord had before.

(a) 3 Man. & G. 139.

(b) 2 M. & Sel. 175.

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In *Townley v. Gibson* (*a*), upon a claim of mines by the lord under a clause in an inclosure Act, saving all royalties incident to the manor, Lord Kenyon, with the Court of King's Bench, held that the mines were parcel of the soil, and that the saving clause did not extend to any rights of the soil, but only to incorporeal seigniories.

Thus the effect of the saving clause has been thrice the subject of adjudication, and the opinion has been unanimous against the construction contended for by the plaintiff here. But if the words are to be construed as a grant of a right supposed to have been intended and not expressed, we are to conjecture what right both parties supposed to exist in the lord over the freeholds of others within the manor. They may have supposed it to be exclusive like free-warren, or concurrent like a grant of liberty to sport, which, according to *Wickham v. Hawker* (*b*) and the cases there cited, would be a concurrent right only; the grantee would have a profit à prendre; he might take game if he came or sent for it, and he would have a common of fishing. Construing the statute on this conjecture, I am of opinion that there is no evidence that the grantees supposed that an exclusive right existed. A right of free-warren is very rare, and where it exists it is still more rare to find it exercised to the full extent, and it seems more reasonable to suppose that a right of sporting whenever he chose was granted, the extent of which would be familiarly known, rather than an exclusive right, which is unknown as an estate at common law and has scarcely been heard of as a creation by statute, which would give power of oppression to the lord without any compensating good to the allottees.

But as I see no ground for assuming that the allottees intended to grant any right incident to the ownership of their allotments, it is useless to consider this construction

(*a*) 2 T. R. 701.

(*b*) 7 M. & W. 63.

further, and for the reasons before given I think a concurrent right was not comprised by this statute.

As to the Woodside allotment, I concur with the Court below.

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WILLES, J.—I am also of opinion, that as to the Clint allotment, judgment ought to be in favour of the defendant.

COLERIDGE, J.—Two questions arose in this case; but in respect of one—the rights of the plaintiff upon the Woodside allotment, we intimated our opinion in the course of the argument, that the judgment of the Court below ought to be affirmed. It remains to dispose of the other, namely, whether the plaintiff has any right, exclusive or concurrent with the defendant, of hunting, shooting, fishing, and fowling over the allotment called the Clint allotment. This question depends on the construction of the 51 Geo. 3, an Act for enclosing Bailey Hope pasture. From the recital in the preamble it appears that Bailey Hope was a stinted pasture, containing about 4000 acres, within and parcel of the manor of Nicholforest; and it is stated that Sir J. Graham, as lord of the manor, was owner of the soil of Bailey Hope, entitled to all mines and minerals under it, and also “to other rights, royalties, liberties, and privileges in and over the same.” In the same preamble it is also stated, that Sir J. Graham was owner of messuages, lands, and tenements within the manor, and of shieldrooms on the Bailly Hope, and in respect thereof was, or claimed to be, entitled to cattlegates on it, and “to rights of common of turbary and other rights thereon.” By the enacting clause, Sir J. Graham is to have a certain allotment of the Bailey Hope in satisfaction for his right and interest as lord of, in, and to the soil of the said Bailey Hope; and by another section he is also to have an allotment in respect

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of his cattlegates, right of common, or other rights upon it. It is then provided, that notwithstanding the division and inclosure, and that the allotments are declared to be freehold to all intents and purposes whatever, the said Sir J. Graham, his heirs and assigns, lords of the said manor, shall for ever be taken to be owner or owners of all mines; and all necessary powers of searching for, winning, working, and carrying away the minerals under the allotments are given in the largest terms; he and they making reasonable satisfaction for the damage done to the owners of the allotments; and then the Act concludes with this proviso:— “That nothing herein contained shall prejudice, lessen, or defeat the right, title, or interest of the said Sir J. Graham, his heirs, or assigns, lords of the said manor, of, in, or to any seigniories, royalties, rights, or services incident or belonging to such manor, but that he and they shall and may, from time to time and at all times hereafter, hold and enjoy the same respectively, *and* all rents, services, fines, courts, courts leet, and baron, perquisites and profits of courts, waifs, estrays, and forfeitures, and all coals, mines, minerals, ores, and metals whatever, and all powers of winning, working and getting the same; and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture and every part and allotment thereof, and all *other* seigniories, royalties, and privileges to the lords of the said manor for the time being incident or belonging, (other than and except those which are expressly declared to be barred, destroyed and extinguished by this Act), in as full, ample, and beneficial a manner as they respectively could or might have held and enjoyed the same in case this Act had not been passed.”

It is admitted that before the passing of the Act, the plaintiff and those whom he represents had the exclusive right of sporting over the whole of the Bailey Hope, of

which the land now called the Clint allotment was parcel, and it cannot be denied that it was the intention of the legislature to preserve to him that right, and this intention will be defeated unless he has such exclusive right "in as full, ample, and beneficial a manner as he could or might have held it in case the Act had not passed."

It is true, that before the Act passed the right of sporting was not a seigniorial right, nor a franchise or easement enjoyed over the land of another; such a right he had not, but a coextensive right incident to the ownership of the soil. The soil is now taken from him and incidentally the right which he possessed as owner is extinguished; consequently, if he has now the privilege of exclusive sporting, it will be in virtue of a right different in its legal character from his old one, and so in some sense new; whereas it is said the proviso was framed merely to preserve old rights which were capable of preservation, and was not intended to create any new ones.

I do not suppose that the framer of this Act intended to create any rights in substance new, by the insertion of this saving proviso; but I think it clear, from the language used, that he intended to preserve the substance of all ancient rights; and that the technical distinction between manorial rights and rights of soil was not present to his mind may be collected from the language he has used. In the preamble of the Act we find it stated, that "Sir J. Graham as lord of the manor is owner of the soil of the stinted pasture, and is entitled to all mines and minerals within and under the same, and to *other rights, royalties, liberties, and privileges over the same.*" Here the ownership of the mines under his own land is classed with other rights, royalties, liberties, and privileges over the same; and among these last it is probable that the right of sporting was intended to be included. So again in the proviso, after the general saving

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of the lord's title and interest as such to all seignories, royalties, rights, or services incident or belonging to the manor, follows in affirmative language what seems intended for an enunciation and legislative exposition of the particulars included under those heads, and among them we find "all coals, mines, minerals, ores, and metals whatsoever, and all powers of winning, working, and getting the same;" and immediately after these words come those on which the question turns, "and also right of hunting, &c., in, through, and over the said stinted pasture and every part and allotment thereof," which words are again immediately followed by, "and all other seignories, royalties, and privileges to the lords of the said manor incident or belonging." Is it not abundantly clear from this, that mineral rights and sporting rights were considered by the framer as being within the same category, and both as seigniorial incidents of the lordship of the manor? And will not the same reasoning which excludes the sporting rights, equally exclude the mineral rights from being saved under this proviso? It is true that these last are secured by a previous section, and that the introduction of the words which describe them in the proviso was unnecessary; but they do not the less serve to shew what was the intention and understanding of the framer of the clause. In truth to all but lawyers, this understanding as to these rights would seem very reasonable, and the language not so very incorrect: where the principal surface enjoyment is in the tenants or commoners, those rights which the lord exercises either over or under the surface, though strictly referable to the ownership of the soil still remaining in him, are very commonly considered to be rights in him merely as lord, and to be incidental to the manor as such, as much as his right to courts, waifs, estrays, or forfeitures. Now, when it is clear from the context of an instrument in what sense words are used in that

instrument, the sound rule of construction is to attribute to them that meaning, even though the words be technical and have technically a different meaning; for it is only so that you can effectuate the intention, and this rule certainly applies to an act of parliament of this description.

Thus I arrive at the conclusion that the proviso saves to the lord a right of hunting, shooting, fishing, and fowling over the allotment in question; and this right must be exclusive, for that was the character of the right existing before the Act passed, and the object of the proviso is expressly to preserve the former right unimpaired by the consequences of the inclosure.

I collect from the report of the case in the Court below, that that Court would have probably arrived at the same conclusion to which I have been led but for the case of *Greathead v. Morley* in the Common Pleas (*a*), from which they were unable to distinguish the present, and by which, as the decision of a co-ordinate Court on the point, they thought themselves bound to abide. The judgment of the Court of Common Pleas is at all times and in all Courts entitled to the greatest respect, and I should not venture even in a Court of error to differ from it without much consideration and hesitation; but I cannot say that the reasoning on which this judgment is founded appears to me satisfactory; and I think it better to avow this at once than attempt to distinguish the two cases. It seems to me that the judgment there deprived the defendant of a right which the Inclosure Act clearly intended to save to him, and the argument was that "the statute would have employed proper words for the purpose if it had intended to create the right." One must have had small experience in private acts of parliament not to know that such a reason is

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very often not warranted by the fact ; and in this very Act, as the judgment itself shews, the lord had an allotment given him in compensation for a right of common over his own soil, not only as great, but as patent in inaccuracy of language, as to speak of a liberty or franchise of sporting over his own soil. I confess it seems to me wiser to ascertain from the context, whether the legislature has in fact used the technical words in their strictly technical, or in some larger and popular sense, and so to ascertain its real intention, than to presume that it must have used them in the former, and so defeat it. I am of opinion therefore, on this ground, that in respect of the Clint allotment the judgment of the Court below ought to be reversed, and that Sir J. Graham has under the Inclosure Act an exclusive right of sporting over that allotment.

Judgment accordingly (a).

(a) See *Rigg v. The Earl of Lonsdale*, Hilary Vacation, post.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

Nov. 28.

FRENCH v. PHILLIPS.

A count alleged that the plaintiff held a workshop as tenant to the defendant at a certain rent, and that the defendant wrongfully seized divers goods and chattels of the plaintiff, of great value, to wit, of the value of 30*l.*, as a distress for arrears of rent, to wit, 13*l.* 10*s.*, then claimed by the defendant to be in arrear, and the defendant afterwards wrongfully sold the said goods and chattels for the alleged arrears of rent, and costs ; whereas in fact a small part only, to wit, 9*l.* of the pretended arrears of rent so distrained for was in arrear. The defendant pleaded not guilty, and at the trial a verdict was found for the plaintiff, with 10*l.* 10*s.* damages. Held, in the Exchequer Chamber, that the count disclosed no cause of action.

workshop with the appurtenances, as tenant thereof to the defendant, at and under a certain rent payable by the plaintiff to the defendant: yet the defendant heretofore wrongfully and injuriously seized and took divers goods and chattels of the plaintiff, that is to say, carriages, carts, wheels, wood, &c. (specifying other articles), of great value, to wit, of the value of 30*l.*, as a distress for certain arrears of rent, to wit, 13*l.* 10*s.*, then claimed and pretended by the defendant to be due and in arrear from the plaintiff to the defendant for rent of the said premises; and the defendant afterwards, under that pretence, wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent, and the costs and charges of the said distress, and of the appraisement and sale of the said goods and chattels: whereas in truth and in fact, at the time of the making of the said distress and during all the time aforesaid, a small part only, to wit, the sum of 9*l.*, of the said pretended arrears of rent so distrained for was in arrear to the defendant for the rent of the said premises.

Plea: Not guilty.

At the trial, a verdict was found for the plaintiff with 10*l.* 10*s.* damages, whereupon the defendant brought this proceeding in error and assigned the following grounds of error.—First, that the count discloses no cause of action, as the only alleged wrong therein contained and sued for is the distraining by the defendant of the plaintiff's goods on a claim of more rent being in arrear than was in fact in arrear, and selling them on such claim, and that such alleged wrong is not actionable: Secondly, that the facts stated in the count disclose no legal injury done to the plaintiff by the defendant, as they admit that some rent was due to the defendant, and it is not alleged, nor can it be inferred, that the distress taken for such rent was excessive.

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Huddleston (*Bennett* with him), for the defendant (*a*).—The count discloses no cause of action. It merely alleges that the defendant took the goods as a distress on a claim for more rent than was really due. The case is not distinguishable from *Tancred v. Leyland* (*b*) and *Glynn v. Thomas* (*c*). [Crompton, J.—The count does not shew that the defendant received more money than was sufficient to satisfy the rent.]

The Court then called on

G. Francis, for the plaintiff.—It is conceded that the mere taking of goods on a claim of more rent than is really due, is not actionable; but if the seizure is followed by a wrongful sale of more than sufficient to satisfy the arrears of rent and costs of the distress, that is a good cause of action. Here the value of the goods sold is alleged, and though laid under a videlicet, after verdict must be taken to be true. In *Tancred v. Leyland* the declaration contained no averment that more goods were sold than were necessary to raise the amount of the arrears actually due and costs. In *Glynn v. Thomas* the Court said that if the untrue claim had been followed by a sale of more of the goods taken than sufficient to raise the amount of rent in arrear, with legal charges, a sufficient cause of action would have arisen. Here it must be presumed that the judge at the trial rightly directed the jury, and as it appears by the record that they have found 10*l.* 10*s.* damages, the reasonable intendment is that more goods were sold than sufficient to satisfy the arrears of rent and costs. [Wightman, J.—It may be that the goods seized were of greater value than the amount of rent due, but it cannot

(*a*) Before Cockburn, C. J., Willes, J.
Wightman, J., *Erle*, J., *Williams*, (b) 16 Q. B. 669.
 J., *Crompton*, J., *Crowder*, J., and (c) 11 Exch. 870.

be intended that they sold for more.] It is alleged that goods of the value of 30*l.* were seized and that the defendant wrongfully sold them under the pretence that more rent was due than was in fact due: that is equivalent to an allegation that more goods were sold than were necessary to satisfy the rent. In *Tancred v. Leyland*, *Parke*, B., in delivering the judgment of the Court of error, said:—“Nor can it be disputed, that if a larger quantity of the goods so taken than was sufficient to raise the amount of the rent in arrear, and legal costs, had been subsequently sold, such excessive sale would have been illegal and actionable.” [*Willes*, J.—You wish to change this into a count for an excessive distress; but such a count should allege in distinct terms that the distress was excessive and unreasonable. *Williams*, J.—Assuming that all the sums stated in the count were proved to be the true amounts, how is the plaintiff prejudiced by the defendant taking goods of greater value than the rent due? If the count had gone on to allege that the proceeds were more than reasonably sufficient to satisfy the rent and costs, that would have been a ground of action.]

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Cockburn, C. J.—We are all of opinion that the case is not distinguishable from *Tancred v. Leyland* and *Glynn v. Thomas*, and consequently the judgment of the Court below must be reversed.

Judgment reversed.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

Nov. 27.

MARY WELD v. BAXTER.

A declaration in covenant in a lease, (yielding rent "to the lessor, his heirs and assigns," with a covenant for payment of the rent "to the lessor, his heirs and assigns," by the devisee of the reversion against the lessee,) alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. Plea.—That the reversion of and in the demised premises did not belong to the lessor and his heirs. Replication by way of estoppel.—That the lease was an indenture executed by the defendant, and that he entered and enjoyed the demised premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple, nor did the indenture contain anything to shew that the reversion did not belong to the lessor and his heirs. On demur to the replication: *Held* in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the plea was good, as traversing a material allegation in the declaration, and that the replication was bad.

(a) 11 Exch. 816.

and was seised in her demesne as of freehold, for the term of her natural life, of and in the said demised premises.—Averment of performance of conditions precedent.—Breach: non-payment of two quarters' rent.

Plea.—That the reversion of and in the demised premises did not belong to the said G. H. Weld and his heirs, as in the declaration alleged.

Replication by way of estoppel.—That the lease in the declaration mentioned to have been made by the said G. H. Weld to the defendant was an indenture sealed and executed by the defendant and the said G. H. Weld respectively: that, under and by virtue of the said indenture, the defendant did enter into and upon the demised premises, and became possessed of the said term so to him by the said indenture granted, and that the defendant, at the time of the breach in the declaration mentioned, occupied, possessed, and enjoyed the demised premises under and by virtue of the said indenture, and by no other title whatsoever: that it does not appear in or by the said indenture that the said G. H. Weld was not seised in fee of the said demised premises, or that he had any estate or interest therein other than a fee simple, or any particular estate or interest whatsoever; nor doth the said indenture contain anything to shew that the reversion of and in the said demised premises did not belong to the said G. H. Weld and his heirs, as in the declaration alleged.—Prayer of judgment, if the defendant ought to be admitted, against the said indenture and the reversion thereby admitted to be in the said G. H. Weld, to plead the said plea.

Demurrer and joinder therein.

Raymond now argued for the plaintiff.—The declaration does not contain any averment, by way of inducement, that G. H. Weld was seised in fee. It sets forth the lease, and

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then states, as a conclusion of law, that the reversion belonged to G. H. Weld and his heirs. This allegation therefore is not traversable; and the plea traversing it, and not the matter on which it is founded, is bad, the estoppel appearing on the face of the declaration. [*Williams*, J.—The declaration states that G. H. Weld being seised in fee of the reversion, devised it to the plaintiff. It was necessary to shew that he had some estate which he could devise.] The defendant is estopped from denying that the reversion belonged to G. H. Weld and his heirs. The estoppel appears upon the indenture set out in the declaration; for the reservation of rent is to the lessor, his heirs and assigns. [*Williams*, J.—Whatever may be the words of the reservation the rent goes with the reversion. *Willes*, J.—Suppose the reversion was a chattel interest, the executor would not be estopped.] There must be some reversion by estoppel, and that reversion is *prima facie* a reversion in fee: the Court cannot qualify the extent of the estate. The estoppel must be taken as against the party bound by it in the fullest and strongest sense. If, *prima facie*, it must be presumed to be a reversion in fee, it lies on the lessee to get rid of the presumption, and he must do so by a plea in confession and avoidance. [*Crompton*, J.—If any particular estate is alleged, the allegation is traversable: *Brudnell v. Roberts* (a). The defendant cannot confess and avoid; the confession would be a confession of the seisin in fee.] In Smith's Leading Cases, vol 1, p. 66, 4th ed., it is said:—“If a lease be made by indenture, in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor conveys all his interest, the disputed question arises, whether the assignee can sue the lessee for breaches of covenant in respect of

which the lessor might have sued had there been no assignment." Here the plaintiff, acting on the suggestion of the learned editors, has replied a lease, in which it appears that the lessor had an estate in fee. The case of *Carwick v. Blagrave* (*a*), therefore, does not decide the question. [Williams, J.—Suppose the lessor had an estate pur auter vie, or an estate for years, how should the defendant plead?] He must plead specially. [Williams, J.—*Warburton v. Ivie* (*b*) confirms your view, but that case relates to the form of the plea.] The burthen of proof lies on the defendant, and he cannot shift it on the plaintiff by this plea. [Willes, J.—If the plaintiff had joined issue the jury would have found that the lessor had an estate in fee, if nothing appeared but the lease. Williams, J.—According to the case in the Court of Exchequer in Ireland, it appears that the title could not be traversed in the terms in which it is alleged. It is by no means clear that the case is not wrong. It was, however, mere question as to the form of the plea.]

*Kingdon, contra, was not called on.*

Per CURIAM (*c*).—The judgment of the Court below must be affirmed.

Judgment affirmed (*d*).

(*a*) 1 B. & B. 531.

(*b*) 1 Jones (Exch. Ireland), 313.

(*c*) Cockburn, C. J., Coleridge, J., Wightman, J., Erle, J., Wil-

liams, J., Crompton, J., and Willes,

J.

(*d*) See *Doe dem. Lord Downe*

v. Thompson, 9 Q. B. 1037.

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## Exchequer Reports.

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HILARY TERM, 20 VICT.

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**ANN ALLAN, Administratrix of WILLIAM ALLAN, Deceased,**  
*v. DUNN.*

*Jan. 21.*  
To an action  
of detinue, the  
defendant  
cannot plead  
payment of  
money into  
Court in satis-  
faction of the  
value of the  
goods.

THE declaration in this case was as follows.—For, that the defendant converted to his own use, or wrongfully deprived the plaintiff, as such administratrix, of the use and possession of the plaintiff's goods as such administratrix, that is to say, &c. (specifying the goods). And also for that the defendant detained from the plaintiff, as such administratrix, the plaintiff's goods, as such administratrix, to wit, &c. And the plaintiff, as such administratrix, claims 100*l*. in respect of the causes of action in the first count mentioned, and a return of the said goods, or their value, being 100*l*, in the last count mentioned, and 20*l*. damages for their detention.

Plea.—Payment into Court of 8*l*, and that the said sum is enough to satisfy the plaintiff's claim.

Demurrer and joinder therein.

*Manisty*, in support of the demurrer.—The plea is bad. The object of suing in detinue is to obtain a specific

delivery of the goods. In trover their value alone can be recovered; but if this plea were allowed there would be no distinction between detinue and trover. The 78th section of the Common Law Procedure Act, 1854, empowers the Court or a Judge "to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed." The defendant should, therefore, by his plea offer to return the goods, and pay the money into Court in respect of the damages sustained by reason of their detention. In *Crossfield v. Such* (*a*) it was held that the delivery to and acceptance by the plaintiff of the goods, might be pleaded in bar of their recovery, or their value; and that the plaintiff could only have judgment for any damages which he might have sustained by their detention, and in respect of such damages money might be paid into Court. [Martin, B.—This plea deprives the plaintiff of his right to judgment for a return of the goods. It might as well be argued that money could be paid into Court in an action of ejectment.] The case of *The Bishop of London v. M'Neil* (*b*) is an authority that payment into Court cannot be pleaded, where its effect is to deprive the plaintiff of the judgment which he would otherwise be entitled to.

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*Hugh Hill* (*J. Addison* with him), contra.—Prior to the Common Law Procedure Act, 1854, the option of giving up the goods or paying their value was in the defendant, who, by refusing to deliver the former, rendered himself liable to pay the latter: *Phillips v. Jones* (*c*). It is true that the 78th section of that Act deprived the defendant of this option; but here the plaintiff shapes his claim in the alternative: he asks for "a return of the goods or their

(*a*) 8 Exch. 159.(*b*) 9 Exch. 490.(*c*) 15 Q. B. 859.

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 ALLAN
 v.
 DUNN.

value." If he seeks to avail himself of the statutory provision, he should have confined his claim to a return of the goods. [*Martin*, B.—He says in effect, "I want the goods if I can get them, if not their value." *Watson*, B.—The form of the judgment in *detinue* is, that the plaintiff do recover against the defendant the said goods, or the said £ —, for the value of the same if the plaintiff cannot have again his said goods, and also his said damages and costs to £ —, beyond the value aforesaid," &c. (a). The 70th section of the Common Law Procedure Act, 1852, enables a defendant to pay money into Court in all actions, with a few exceptions which do not include *detinue*. *Pollock*, C. B.—The plaintiff has a right to recover the goods in specie if he can get them, and the effect of this plea is to deprive him of that right.]

Hugh Hill then prayed leave to amend, which was granted.

Amendment accordingly.

(a) Chit. Forms, p. 246, 7th ed.

Jan. 22.

GOODMAN v. GRIFFITHS.

The defendant agreed to purchase of the plaintiff certain goods at a discount of issue was joined. 25 per cent. from a list of goods with prices annexed, and he signed an order for the goods referring to the list. The terms as to discount were not mentioned in the order. The defendant afterwards wrote to the plaintiff requesting him to send the invoice, which he did. The defendant wrote in reply a letter, signed by him, returning the invoice and declining to take the goods: *Held*, first, that the order was not a sufficient memorandum of the bargain within the 17th section of the Statute of Frauds, as it did not contain the price: Secondly, that the letter returning the invoice was not a sufficient admission of the contract as stated in the invoice, so as to satisfy the statute.

At the trial before *Martin, B.*, at the Middlesex sittings after last Michaelmas Term, the plaintiff, a patentee of mechanical binders, proved that he called on the defendant for an order, shewing him, at the same time, a printed list of the different sizes, with the price of each annexed. The plaintiff wrote down the following order, which was then signed by the defendant, and handed by him to the plaintiff.

"Mr. Goodman, June 9, 1855.

Please put in hand, for my account, the following.

| | | | |
|---------------------------|---|---|--------|
| 4 Mechanical Binders | - | - | No. 1 |
| 3 Doz. ditto | - | - | No. 2 |
| 6 Mechanical Binders | - | - | No. 3 |
| 2 Doz. ditto | - | - | No. 14 |
| 1 Doz. Mechanical Binders | | - | No. 5 |
| 1 Single Ditto | - | - | No. 17 |

with two extra cases to each instrument.

Griff. Griffiths."

The numbers referred to the printed list. The words "the price as per note" had originally been written at the foot of the order by the plaintiff, but were struck out by the defendant, the agreement being, in fact, that the plaintiff should take off 25 per cent. discount from the prices marked on the printed list. On the 16th of July the defendant wrote to the plaintiff a letter as follows:—"Mr. Griffiths' compliments to Mr. Goodman, and wishes him to forward the invoice of the goods, and also the size of the package, &c.; if not too large, Mr. Griffiths will take them in his cabin, and may thereby have an opportunity of submitting them to his fellow passengers, and perhaps selling some of them. The goods themselves do not send until he writes again." On the same day the plaintiff sent the invoice with the prices as on the list and the discount taken off according to the agreement. On the 20th of July the plaintiff received the

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following letter from the defendant returning the invoice:—

“ I am very sorry that I must decline taking the goods, as per invoice returned, in consequence of having received very unfavourable intelligence by the last mail,” &c. Yours, &c., G. Griffiths.

The defendant's counsel objected, that there was no sufficient memorandum of the bargain to satisfy the 17th section of the Statute of Frauds, and the plaintiff was nonsuited.

Collier moved to set aside the nonsuit (January 16.)—The order of the 9th of June refers to the printed list of prices, and may be read in connection with it. There was an additional term, viz., that 25 per cent. discount should be taken off. [Bramwell, B.—That may be proved, though not in writing, for the purpose of defeating the effect of a memorandum of agreement duly signed according to the 17th section, and therefore good on the face of it: *Acebal v. Levy* (*a*).] All the documents must be read together, and the imperfections of the original memorandum may be made good by the subsequent letters referring to it: *Warner v. Willington* (*b*), *Saunderson v. Jackson* (*c*), *Allen v. Bennet* (*d*). The plaintiff in the invoice states the terms of the contract, and the defendant in his answer sufficiently recognises them, and admits that the contract is correctly stated (*e*). The defendant does not deny his liability to take the goods, as was the case in *Archer v. Baynes* (*f*).

Cur. adv. vult.

MARTIN, B., now said.—The declaration stated an agreement by the defendant to purchase a number of mechanical

- (*a*) 10 Bing. 376.
 (*b*) 3 Drewry, 523.
 (*c*) 2 Bos. & P. 238.

- (*d*) 3 Taunt. 169.
 (*e*) *Jackson v. Lowe*, 1 Bing. 9.
 (*f*) 5 Exch. 625.

binders. The plaintiff took a printed list of his goods, with the prices annexed, and put it into the hands of the defendant; the defendant bargained for these articles and agreed for a discount, he then signed an order which did not mention the terms as to the discount. The plaintiff having manufactured the goods, sent in an invoice with the prices striking off the discount; the defendant wrote an answer declining to take the goods, making some excuse for not doing so. It was objected, that this was a contract for the sale of goods above the value of ten pounds, and that as there was nothing to satisfy the 17th section of the Statute of Frauds the plaintiff could not succeed. We are of opinion that this objection must prevail. The bargain was for a price 25 per cent. less than that on the list. The order signed by the defendant did not express the real contract, and it does not preclude the defendant from shewing what the contract was. It is not sufficient under the statute because it does not contain the price agreed on. The next question is, whether what took place with respect to the invoice cured this defect? The invoice is the statement of the plaintiff. If the letter returning it had contained an admission that it stated the contract correctly, it might have been sufficient; but in this letter the defendant merely declines to take the goods. We are therefore of opinion that the nonsuit was right.

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Rule refused.

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Jan. 20.

**BARBER v. JESSOPP, Clerk to the LOCAL BOARD OF HEALTH  
for the Parish of WALTHAM HOLY CROSS.**

By the Public Health Act, 1848, s. 8, "upon the petition of not less than one-tenth of the inhabitants, rated, &c., of any city, town, borough, parish, or place, having a known or defined boundary, the General Board of Health may direct a superintending inspector to visit such city, &c., and make public inquiry, &c., as to the sewerage, &c., and as to any

other matters in respect whereof the said Board may desire to be informed, &c. By s. 9, before proceeding upon such inquiry, the inspector shall give notice, &c., and upon the completion of such inquiry, he shall report in writing to the General Board of Health, &c., and upon the presentation of such report, the Board shall cause copies to be published and deposited, &c., and the copies so published shall be accompanied by a notice stating that, within a certain time, written statements may be forwarded to the said Board, with respect to any matter contained in or omitted from the said report, or any amendment proposed to be made therein, and all such statements shall be deposited, &c., and shall be open to inspection, &c. By s. 10, if after such inquiry, &c., it shall appear to the General Board expedient that the Act should be applied to the city, town, borough, parish, or place, with respect to which such inquiry has been made upon the petition, &c., and within the same boundaries as those of such city, &c.; they shall report to her Majesty accordingly, and at any time after the presentation of such report, it shall be lawful for her Majesty to order the Act to be put in force within such city, town, borough, parish or place." The parish of Waltham Holy Cross consists of the township of Waltham Abbey, and certain hamlets. The inhabitants of the parish petitioned that the Act might be put in force within the parish. A superintending inspector having been appointed, inquired as to the parish, but made his report headed "as to the town of Waltham Abbey," and recommended that the Act should be applied to the township of Waltham Abbey. The report was published with a notice by the General Board of Health, that statements might be forwarded with respect to any matters contained in or omitted from the report, &c. No further inquiry by any inspector took place, but on the report of the General Board of Health, by an order in council, the Act was applied within the parish:—*Held*, that the Act was legally put in force within the parish.

The Local Board of Health having made a general highway rate instead of a district rate for the repair of the highways in the parish, an action was brought against the clerk of the Local Board to try the validity of the rate, and a verdict taken, subject to a special case, with liberty to the parties to treat the decision as the ruling at nisi prius; before the passing of 17 & 18 Vict. c. 69. The case was stated after the passing of that Act:—*Held*, that the Court were bound to direct a verdict for the plaintiff for the amount of the highway rate, notwithstanding that Act.

field, Sewardstone and Upshire; the township and hamlets being, respectively, places having each a known and defined boundary. There is, and always has been, one poor rate for the whole parish; and all other rates in this parish, except the highway rate, have always been one entire rate for the whole parish. The parish at large, in vestry assembled, appointed surveyors of the township and hamlets, designating the township or hamlet for which each was appointed to be surveyor. The township and hamlets have always maintained separately their own highways, and each has had its separate highway rate, except in some instances, in which the costs of improvements, for the general benefit of the parish, have either been borne by the parish at large, or contributed to, in agreed proportions, by the township and hamlets respectively.

After the passing of The Public Health Act, 1848, a petition was presented to the General Board of Health, and signed by inhabitants of the township, constituting more than one-tenth of the inhabitants of the parish, praying that the said Act might be applied to the parish. Of the 108 subscribers to this petition, one person only was an inhabitant of one of the hamlets, and six, though residents in the town, were rated as well in respect of property in the hamlets as in the town. The following is a copy of the said petition:—

“ Public Health Act, 1848.

“ Petition for application of the Act.

“ Whereas, by the Public Health Act, 1848, it is enacted, that from time to time, after the passing of that Act, upon the petition of not less than one-tenth of the inhabitants, &c. (reciting section 8 of the said Act.)—Now, therefore, we the undersigned, inhabitants of the *parish of Waltham Holy Cross*, in the county of Essex, and being one-tenth in number of the inhabitants rated to the relief of the

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poor, in respect of property within the same parish, do hereby petition the General Board of Health to direct a superintending inspector to visit the said parish, and to make inquiry and examination with respect thereto, with a view to the application of the said Act, according to the provisions of the said Act in that behalf."

Thereupon a superintending inspector was directed to visit the parish. He held a public inquiry in the town, pursuant to notice from him to that effect, and subsequently presented his report.—The notice was as follows:—

"Whereas, in pursuance of the Public Health Act, 1848, the General Board of Health have directed William Ranger, Esquire, one of the superintending inspectors appointed for the purposes of the said Act, to visit the *parish of Waltham Holy Cross*, in the county of *Essex*, and there to make public inquiry, &c. Now, therefore, I, the said William Ranger, do hereby give notice that, on the 16th day of June now next, I will proceed upon the said inquiry, and that I shall then and there be prepared to hear all persons desirous of being heard before me, upon the subject of the said inquiry.

Dated, &c.

William Ranger."

The report was headed,

"Report to the General Board of Health, on a preliminary inquiry into the sewerage, drainage, and supply of water, and of the sanitary condition of the inhabitants of the *town of Waltham Abbey*, in the county of *Essex*, by William Ranger, Superintending Inspector."

The report commenced, "Pursuant to your instructions, and on receipt of the petition signed by one-tenth of the rated inhabitants, &c." It related chiefly to the *town*, and concluded with a recommendation "that, The Public Health Act, 1848, except the sections No. 50 and 96, in

the copies of that Act, printed by her Majesty's printers, should be applied to the *township of Waltham Abbey*, in the county of Essex."

The following notice was published with the report:—

"The General Board of Health hereby give notice, in terms of section 9 of the Public Health Act that, on or before the 10th of February, 1850, written statements may be forwarded to the Board with respect to any matter contained in or omitted from the accompanying report on the sewerage, drainage, supply of water, and the sanitary condition of the *town of Waltham Abbey*, or with respect to any amendment to be proposed therein. By order of the Board.

Henry Austin, Secretary."

After the date of the report no visit was made to the said township, or either of the said hamlets, by the said, or any other superintending inspector, nor was any further inquiry had, nor was any further report made to the General Board of Health, by the same or any other superintending inspector, nor was any provisional order made by the said board. But on the 9th day of March, 1850, an order was made by her Majesty in council, and duly inserted in the London Gazette, whereby the said Act, except the section numbered 50, was applied to the *whole parish of Waltham Holy Cross*. (A copy of the Gazette, containing the order, accompanied and was taken as part of the case.) The Board of Health, constituted in virtue of the said order, consisting of twelve members, was selected from the said hamlets as well as from the township, and thereupon took upon themselves the management of all the highways in the parish, and have made, among other rates, one general, equal highway rate, for the repairs of the highways of the whole of the said parish, under the General Highway Act. Before the constitution of the

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said board, the highway rates of each of the hamlets were much lower than the highway rates of the township.

The plaintiff was, and is, the occupier of a farm in the hamlet of Sewardstone, and not an inhabitant or occupier of any premises in the township. He was assessed to the said general highway rate, in the sum of 1*l.* 10*s.* 9*d.*, and to a general district rate in the sum of 13*s.* 6*½d.* The validity of both these rates was disputed by the plaintiff, and his effects being seized for the same, the plaintiff paid the amounts of the same under protest, together with the two sums of 5*s.* and 6*s.* for costs, applicable to such rates respectively. Thereupon this action was brought, for such seizure, after notice of action had been duly given, pursuant to the Act.

The questions for the opinion of the Court are:—First, whether the Public Health Act, 1848, was legally put in force for the whole of the said parish, and—Secondly, if so, whether the said highway rate was legally made, or is, notwithstanding the 17 & 18 Vict. c. 69, to be deemed invalid or illegal.

If the Court should be of opinion that the said Act was legally put in force for the whole parish, and that the said rate was legally made, the plaintiff is to be nonsuited. If the Court should be of opinion that the said Act was legally put in force for the whole parish, but that the said rate was not legally made, the verdict is to stand for 1*l.* 15*s.* 9*d.* and costs. If the Court should be of opinion that the said Act was not legally put in force for the whole parish, then the verdict is to stand for 2*l.* 15*s.* 3*d.*, and costs.

Lush argued for the plaintiff (*a*).—The first question is, whether the order in council, applying the provisions of the Public Health Act, 1848, to the whole parish was

(*a*) Nov. 19. Before *Pollock*, C. B., *Alderson*, B., *Branwell*, B., and *Watson*, B.

properly made. The Act recites that, "further and more effectual provision ought to be made for improving the sanitary condition of towns and populous places in England and Wales, and it is expedient that the supply of water to such towns and places, and the sewerage, drainage, cleansing and paving thereof, should, as far as practicable, be placed under one and the same local management and control." Section 8 enacts, "that from time to time after the passing of this Act, upon the petition of not less than one-tenth of the inhabitants rated to the relief of the poor of any city, town, borough, parish, or place having a known or defined boundary, not being less than thirty in the whole," &c., "the General Board of Health may, if and when they shall think fit, direct a superintending inspector to visit such city, town, borough, parish or place, and to make public inquiry and to examine witnesses as to the sewerage," &c., "and the boundaries which may be most advantageously adopted for the purposes of this Act; and as to any other matters in respect whereof the said board may desire to be informed for the purpose of enabling them to judge of the propriety of reporting to her Majesty or making a provisional order," &c. By section 9, "before proceeding upon such inquiry the said inspector shall give fourteen days' notice of his intention to make the same, and of a time and place at which he will be prepared to hear all persons desirous of being heard before him upon the subject of such inquiry, &c.;" and "after the completion of such inquiry, he shall report in writing to the General Board of Health," &c.; "and if, upon such report, it appear to the said General Board that the boundaries, which may be most advantageously adopted for the purposes of this Act, are not the same as those of the city, town, borough, parish or place, with respect to which inquiry has been made,

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they shall cause the same, or some other superintending inspector, to visit the parts within the boundaries proposed to be adopted for the purposes of this Act, and (after having given such notice as is hereinbefore prescribed) to hear all persons desirous of being heard before him on the subject of the said report, and to make such further inquiry and report to the said Board as they may direct; and upon the presentation of such report, or further report, the said Board shall cause copies thereof respectively to be published," &c.: "and shall also cause other copies, &c., to be deposited with the town clerk," &c.; and "the copies so published, or deposited, shall be accompanied by a notice, stating that within a certain time, not being less than one month from the time of such publication and deposit, written statements may be forwarded to the said Board with respect to any matter contained in or omitted from the said report, or further report, or any amendment proposed to be made therein; and all such statements shall be deposited with such town clerk, &c., and shall, together, with such copies, be open to public inspection" &c. Here the petition prayed that the Act might be applied to the parish. The inspector was directed to inquire as to the parish, but did, in fact, make inquiry only with respect to the *township*. The report is only as to the town, as appears from its heading. The commissioners were bound, before applying the Act to the parish, to cause an inquiry and report to be made as to the parish. The object of the provisions of the 9th section is, to give persons, whose interest may be affected by the Act being put in force in any particular district, an opportunity of forwarding written statements respecting any matters in the report which may affect their interests. The inhabitants of the hamlets not only had no notice to enable them to forward such statements, but were expressly told that

they were not to be affected. The 10th section (*a*) enables the General Board of Health to report, but only after such inquiry as is spoken of in the 9th section.

As to the second point, assuming that the order in council is valid, a Local Board of Health has no power to make a highway rate. [*Watson*, B.—In the last case on the subject, *Moseley*, App., *The Local Board of Health of the City of Ely*, Resp. (*b*), *Hanson*, App., *The Local Board of Health, Epsom*, Resp. (*c*) and *Dorling* App., *The Local Board of Health Epsom*, Resp. (*d*) were considered.] By a highway rate, under 5 & 6 Wm. 4, c. 50, s. 27, all lands are assessed alike, on the full annual value of the property: by a district rate under sect. 88, of the Public Health Act, 1848, occupiers of land, used as arable, meadow or pasture ground only, are to be rated at one fourth of the annual value. The 17 & 18 Vict. c. 69, after reciting that doubts had arisen whether the money requisite for the repair of

(*a*) Section 10 enacts, "That if after such inquiry or further inquiry as aforesaid, it appear to the said General Board of Health to be expedient that this Act or any part thereof should be applied to the city, town, borough, parish, or place, with respect to which inquiry has been made, upon the petition of such inhabitants as aforesaid, and within the same boundaries as those of such city, &c., and within which there is no local act of parliament in force for paving, &c.; they shall report to her Majesty accordingly; and at any time after presentation of such report, it shall be lawful for her Majesty, &c., to order that this Act or any part thereof shall be applied to, and be put in full force and operation within, such city, town, borough, parish,

or place; and if after such inquiry, or further inquiry as aforesaid, it appear to the said General Board, to be expedient that this Act, or any part thereof, should be put in force, within boundaries not being the same as those of the city, town, borough, parish, or place from which the said petition proceeded, &c.; they shall make a provisional order under their hands and seal of office, accordingly with such provisions, regulations, conditions and restrictions, with respect to the application and execution of this Act, or any part thereof, &c., and in all respects whatsoever, as they may think necessary under all the circumstances of the case."

- (*b*) 6 E. & B. 518.
- (*c*) 5 E. & B. 599.
- (*d*) 5 E. & B. 471.

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highways in districts under the Public Health Act, 1848, should be raised by highway or by general district rates, enacts, that no highway rate made before the passing of that Act by any Local Board of Health, shall be deemed invalid or illegal, &c.; but it does not affect actions in which a verdict has already been obtained. There is nothing to give it a retrospective operation. The question raised by the special case is, whether, when the verdict was taken, the rate was legal.

*Bovill* (with whom was *Malcolm*), for the defendant—The petition was by the inhabitants of the parish, and the inspector gave due notice that the inquiry would be held as to the parish. The inspector instituted an inquiry in pursuance of the petition and instructions, that is to say, as to the parish. The report is not confined to the *township*. It is as to the *town*, which may be more extensive than the township to which the inspector recommended that the Act should be applied. Every parishioner had an opportunity of being heard in opposition to the scheme suggested by the petition, which has been in fact adopted. The 9th section of the Act contemplates the case of the General Board of Health adopting a boundary different from that of the place from which the petition emanated, and with respect to which they have sent to inquire. The provision as to sending down a second inspector applies to that case only. [*Pollock*, C. B.—Suppose the inspector recommended the Board not to interfere?] That would be sufficient to entitle the Board to make a report. The validity of the order in council does not depend upon the report of the inspector. The Act may be applied arbitrarily anywhere. [*Bramwell*, B.—The inspector need not make any recommendation. The Board may therefore reject his recom-

mendation, and act upon the information elicited by his inquiry.] The Act does not say that the General Board of Health are to be bound by the opinion of the inspector. In many cases the Board comes to a conclusion different from that of the inspector. It was not intended that the discretion of the Board should be controlled by that of the inspector, who is a mere surveyor. The notice published with the report "that written statements might be forwarded to the Board with respect to any matters contained in or omitted from the report" was a gratuitous act.

Further, the notice so published was sufficient. Notice of the intention of the Board to apply the Act to a district more extensive than that to which the inspector recommends that it should be applied, is only necessary where further inquiry is contemplated as prescribed by the 9th section. [Alderson, B.—Did not the notice inform people that the Board were still making inquiry and considering the petition.] The Board may have acted on further evidence, or information elicited by the publication of the notice.

Then as to the highway rate. Assuming the Local Board of Health to be duly constituted as surveyors of the highways, it is difficult to say whether they ought to repair the highways by a district rate under the Public Health Act, or by highway rates. There are several cases on the subject. *Hanson*, App. *The Local Board of Health, Epsom*, Resp. (a), *Dorking*, App. *The Local Board of Health, Epsom*, Resp. (b), *Regina v. Trustees of the Worthing, &c. Roads* (c), *Elmer v. The Local Board of Health, Norwich* (d). (Lush referred to *Moseley*, App. *The Local Board of Health of Ely*, Resp. (e).) Before the decision of *Moseley v. The Local Board of Health*

(a) 5 E. & B. 599.

(d) 3 E. & B. 517.

(b) 5 E. & B. 471.

(e) 6 E. & B. 518.

(c) 3 E. & B. 969.

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of *Ely*, it was supposed that a highway rate might be legally made. The 17 & 18 Vict. c. 69 was passed to indemnify boards of health and make valid highway rates made before its passing; therefore no judgment can now be given impeaching the validity of this rate. The Act contains no saving of existing actions. The question as stated is, whether the rate is, notwithstanding the statute, illegal and invalid. The case was settled since the passing of the Act. [*Alderson*, B.—The Court are to decide what the law was when the verdict was taken.] The local board is to be indemnified. [*Alderson*, B., referred to *Merrick v. Wakley*(a).]

*Lush*, in reply.—The power to apply the Act is a statutory power, and must be followed strictly. It is incumbent on the defendant to shew that all the conditions necessary to give the Board this power have been fulfilled. The 9th section expressly provides that notice is to be given; that written statements may be forwarded with respect to any matter contained in the report; and this applies to the report here, as well as to the further report where further inquiry is necessary. The Board of Health did not give notice to the inhabitants of the parish, but only to the inhabitants of the town of Waltham Abbey. [*Alderson*, B.—The notice did not warn the inhabitants of the hamlet to appear. The Act clearly contemplates that parties are to be heard. *Pollock*, C. B.—From an examination of all the papers, I should be led to conclude that the application of the Act to the whole parish was a mistake.]

Then as to the last point. If the verdict had been taken simpliciter, and no case had been stated, it is clear that the Act would not have enabled the Court to set aside the verdict for the plaintiff. The Act passed after the verdict had been taken. The remedy for defendant, if any, is by

(a) 6 Jurist, 803. See *Regina v. Mill*, 10 C. B. 379.

auditā querebā. [Pollock, C. B.—The defendant should have stopped, and not stated the case.]

*Cur. adv. vult.*

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The judgment of the Court was now delivered by POLLOCK, C. B.—In this case the first question we have to determine is, whether the Public Health Act, 1848, was legally put in force within the parish, and we are of opinion it was. The substance of the objection made by the plaintiff was, that in reality the preliminary proceedings were in reference to the town alone, while the order applying the Act extended to the whole parish. This is, probably, substantially true; and it may be that some injustice has been done, at least to the extent of the Act being extended to those who, being misled by the terms of the notices, did not object thereto, as they otherwise would have done. However this may be, we think the objection cannot be sustained. It was said that an inquiry by a superintending inspector was a condition precedent to the Act being put in force by order in council, and that there was no such inquiry. But the case expressly finds that the superintending inspector held a public inquiry in the town, "pursuant to notice from him to that effect;" and that notice is a notice of inquiry into the parish. It is true that the heading of the report is of "an inquiry as to the town," but that is unimportant, when it is positively stated that the inquiry was as to the parish. Then it was said, that notice that written statements may be forwarded as mentioned in section 9 of the Public Health Act, had not been duly given, because in the notice actually given, the report was said to be "of the town of Waltham," instead of the parish. To this it is enough to answer, that the giving of such notice is not a condition precedent.

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As to the second question,—on the authority of the cases in the Queen's Bench, as admitted by Mr. *Bovill*, we must hold that the highway rate was illegal. It was then said, this was cured by the 17 & 18 Vict. c. 69. The trial, however, took place before that Act. We are of opinion that we ought to pronounce the same judgment now as ought to have been pronounced by the Judge at the trial. This appears clear from the agreement of the parties; for by that the decision of the Court may be treated as the ruling at Nisi Prius, and excepted to. Whatever relief therefore the defendant may be entitled to by virtue of that Act, if any, it seems to us that we must direct the verdict against him for the amount of the highway rate.

Verdict to stand for 1*L*. 15*s*. 9*d*.

Jan. 26.

PEDDELL v. GWYN.

Scire facias against a shareholder on a judgment against a Joint Stock Company completely registered under the 7 & 8 Vict. c. 110. Plea: setting out the record, by which it appeared that the action was on a bill of exchange, accepted by two directors of the Company in the form prescribed by the 45th section of that Act, and indorsed to the plaintiff. The plea then stated that a clause in the Company's deed of settlement only authorized the directors to accept bills binding the shareholders to the extent of their shares, and that the defendant had paid up his shares. On demurrer,—*Held*, that the plea was bad; for, assuming that it would have afforded a defence to the original action, it could not now be pleaded to the *scire facias*.

and effects of the Company having become vested in the said official manager under the "Joint Stock Companies Winding up Act, 1848," the plaintiff had been unable, by execution or otherwise against the property and effects of the Company, to obtain satisfaction of the judgment: that the defendant at the time of the recovering of the judgment was and still is a shareholder in the Company.—The writ then proceeded to command the defendant to appear in Court and shew cause why the plaintiff should not have execution against him for the claim and damages aforesaid, together with interest, &c.—The declaration concluded in the usual form, by stating that the writ and matters therein stated were true, &c.

Plea.—That the record in the declaration mentioned was and is in the words following.—(The plea then set out the record.) The first count of the declaration was on a bill of exchange, drawn the 1st May, 1850, by one J. Hooper upon and accepted by the Sea Life Fire Assurance Society for payment to the order of A. Collingridge, of 300*l.* two months after date, and by A. Collingridge indorsed to the plaintiff. There were also counts for work and materials, money paid, &c.—Pleas to first count: 1. That J. Hooper did not make the bill. 2. That the Sea Fire Life Assurance Society did not accept the bill. 3. That A. Collingridge did not indorse the bill. 4. That the bill was made and accepted and delivered to A. Collingridge, in pursuance of an agreement that he should hold it on behalf of the Sea Fire Life Assurance Society and not on his own behalf, and that there was no consideration for the drawing, &c.: that A. Collingridge, in violation of the agreement and in fraud of the Society, indorsed the bill to the plaintiff, who had notice of the premises, and held the bill without consideration. 5. That the bill was made, accepted, and delivered to A. Collingridge whilst he was a

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director of the Society, and without consideration : that an order absolute was made for winding up the affairs of the Society, which was referred to a Master of the Court of Chancery : that the bill was indorsed to the plaintiff after such order, without any direction of the Master, and that the plaintiff took it with notice and without consideration.

6. To the residue of the declaration : Never indebted. The replications took issue on the pleas, and there was a verdict for the plaintiff on all the issues, and a general judgment for 190*l*. debt, and 85*l*. 9*s*. costa.—The plea then stated, that before and at the time of the drawing, accepting and indorsing of the bill of exchange, the Sea Fire Life Assurance Society was a Company completely registered under and by virtue of and pursuant to the act of parliament, &c. (7 & 8 Vict. c. 110), and not then, or at any time, a Company incorporated by act of parliament or charter, or a Company the liability of the members of which was or is restricted by virtue of any letters patent ; and that the said Company was not then, or at any other time, otherwise constituted than as last aforesaid : that the deed of settlement of the said Company did not, nor did any bye law of the Company, at any time contain any clause, power, or authority, authorizing or enabling the directors of the Company, or any other person or persons on behalf of the Company, to make, draw, accept or indorse bills of exchange or promissory notes, or either of them, or any bill of exchange or promissory note, excepting a certain clause in the said deed of settlement contained, to wit, the 44th clause thereof, which was and is in the words following, that is to say,—“ That the directors shall, and they are hereby authorized to make and issue, indorse and accept, in the name of and on account of the Company, such bills of exchange and promissory notes as they may think expedient : provided that the total amount of such bills and

notes due at any one time shall not exceed the sum of 100,000L; and all such bills and notes, and no other, shall be so made and issued, indorsed, or accepted, as to be binding on the Company, and on the shareholders and each of them to the extent of the respective shares held by them in the capital stock of the Company, and no further or otherwise;" that the bill of exchange, in the said record mentioned, was and is in the words and figures following:—

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Two months after date pay to the order of Augustus Collingridge the sum of Three hundred pounds for value received.

For Sea Life Fire Assurance Society,  
The Sea Fire Life                    J. C. Hooper, Secretary,  
Assurance Society,                    C. M. 206.  
31, Cornhill, London.  
Ent<sup>d</sup>. J. F. A. acc<sup>t</sup>. a R. 4th July, 1850. 1/6.

Accepted for and on behalf of the Sea Fire Life Assurance Society.

William Ogilvie, Bart.

**Augt. Collingridge.**

**Count<sup>ed</sup>. J. F. Ashford A. S."**

**Averments.**—That the defendant did not at any time authorize the Company, or the directors thereof, or any person for or on behalf of the Company or otherwise howsoever, nor were, nor was the Company or the directors thereof, or any other person whosoever, in any way authorized to accept the bill of exchange in the said record mentioned, or any bill of exchange or promissory note, otherwise than by the said clause in the deed of settlement of the Society: that before the suing out of the writ of scire facias, and before the 8th November, 1854, the date of the commencement of the action in the said record

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mentioned, the defendant had fully paid up all the instalments upon all shares in the capital of the Company ever held or belonging to him, or standing in his name, to the full and total amount of all such shares.

Demurrer and joinder therein.

Hawkins, in support of the demurrer.—The plea is bad. It attempts to set up as an answer to the scire facias matter which, if sufficient in law, should have been pleaded to the original action.

The Court then called on

Bovill (with whom was *Garth*), to support the plea.—The plea discloses facts which shew that the judgment against the Company cannot be enforced against a shareholder who has paid up the full amount of his shares. A Joint Stock Company, completely registered under the 7 & 8 Vict. c. 110, becomes a quasi corporation, and the liability of its shareholders is different from that at common law. A judgment against the Company must first be enforced by execution against the property and effects of the Company, and if satisfaction cannot be obtained, then against the person, property, and effects of any shareholder for the time being (sect. 66). So that persons are rendered liable who were not shareholders at the time the contract was made. Then, if it is sought to charge those shareholders, it must appear that the contract was one which the directors had authority to make. The bill of exchange set out in the plea is drawn in a form not authorized by the deed of settlement, and is therefore not binding on the shareholders. By the 7 & 8 Vict. c. 110, s. 7, no Joint Stock Company shall receive a certificate of complete registration unless it be formed by a deed, which must make provision for (amongst other purposes) determining whether and to what extent the directors may

accept bills of exchange. (Schedule A. 38). The 45th section enables the directors to issue bills, if they are authorized to do so by the deed of settlement. The 44th clause of this deed only authorizes them to issue bills binding on the shareholders to the extent of their shares. Persons who deal with these Companies must be taken to know that the directors have no power except that conferred upon them by the act of parliament: *Smith v. The Hull Glass Company* (a). In *Ridley v. The Plymouth Grinding and Baking Company* (b), Parke, B., said, "It is competent to every person dealing with such a Company to ascertain the objects of the Company, for the deed must specify them and also who the directors are, and any person may find in that deed the duties of the directors and their powers as between them and the Company. Therefore every person seeking to bind the Company by a contract with the directors, must give some proof of their authority." Again in *The Royal British Bank v. Turquand* (c), Jervis, C. J., said, "We may now take for granted that the dealings with these Companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement." Therefore the plaintiff is in the situation of a person who has taken a bill accepted by procuration, and he was bound to ascertain, before he took it, that the acceptance was agreeable to the authority given: *Attwood v. Munnings* (d), *Alexander v. Mackenzie* (e). The bill in question may be binding on the Company, so that the judgment may be enforced against their property and effects; but the shareholders are bound only to the extent of their shares. In *Halket v. The Merchant Traders' Ship*

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| (a) 11 C. B. 897, 926. | (d) 7 B. & C. 278. |
| (b) 2 Exch. 711. | (e) 6 C. B. 766. |
| (c) 6 E. & B. 327. | |

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*Association* (a), a policy of insurance, under the seal of a Joint Stock Company, contained a proviso that the shareholders should not be liable beyond the amount of their shares, and it was held that the terms of the policy precluded the assured from any remedy at law against the individual shareholders, and that consequently after using due diligence to obtain satisfaction of a judgment recovered against the Company in an action on such policy, by execution against their property, he was not entitled to issue execution against an individual shareholder under the 7 & 8 Vict. c. 110, ss. 66, 68. That decision was recognised and adopted in this Court: *Hassell v. The Merchant Traders' Ship Association* (b). [Martin, B.—In *Hallett v. Dowdall* (c), Cresswell, J., expressed an opinion that the clause in the deed of settlement, exempting every proprietor from liability beyond his own unpaid subscription, was either insensible, or void as being repugnant to the rest of the deed.] *Philipson v. The Earl of Egremont* (d) is distinguishable from the present case. There the contract was one in respect of which the shareholders were liable as well as the Company; here the directors had no power to bind the shareholders beyond the extent of their shares.—He also referred to *Allen v. The Sea Fire Insurance Company* (e).

POLLOCK, C. B.—We are all of opinion that the plea is bad. *Bradley v. Eyre* (f) is an express authority that a defendant cannot plead to a scire facias any matter which might have been set up as a defence to the original action. The question whether the subject-matter of this plea would have afforded a good defence, depends on the construction of the 7 & 8 Vict. c. 110; but on that point it is unneces-

- (a) 18 Q. B. 960.  
 (b) 4 Exch. 525.  
 (c) 18 Q. B. 2.

- (d) 6 Q. B. 587.  
 (e) 9 C. B. 574.  
 (f) 11 M. & W. 432.

sary to express any opinion, because it is clear that if it would have been a defence to the original action, it cannot now be pleaded to the scire facias. If this judgment has been improperly obtained, it was competent to apply for a new trial, but while the judgment stands, it cannot be impeached on any ground which might have been available to prevent it being obtained. Indeed, if this matter could now be pleaded, I do not see why the Statute of Limitations or any other defence might not be set up. Suppose the judgment had been obtained by perjury: that fact would have furnished a ground for applying to the Court for a new trial, which would have been granted as a matter of course; but so long as the judgment stands it cannot be set up as a defence to a scire facias that the judgment was obtained by perjury.

MARTIN, B.—I am of the same opinion. I always understood that it had been conclusively decided by the case of *Bradley v. Eyre*, that after judgment against a Joint Stock Company, a shareholder could not set up as a defence any matter which would have afforded an answer to the original action. Here the plea sets out the whole of the proceedings in the action on the bill against the Company, the result of which was that the defence was unavailing and the plaintiff recovered judgment. Then the act of parliament says, that every judgment obtained against any Company completely registered may be enforced and execution thereon issued, not only against the property and effects of the Company, but also, if due diligence has been used to obtain satisfaction of the judgment by execution against the property and effects of such Company, then against the person, property and effects of any shareholder for the time being, or any former shareholder. Therefore there is an express enactment that a judgment against a Company

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shall be conclusive proof of the liability of the Company, and that it may be enforced against the shareholders. This plea alleges that the directors had no authority to accept bills of exchange otherwise than by the clause in the deed of settlement. That clause, after empowering them to accept bills and notes to a certain amount, says, that "all such bills and notes and no other shall be so made and issued, indorsed or accepted, as to be binding on the Company and on the shareholders, and each of them, to the extent of their respective shares." I am inclined to think, however, that, as regards third parties, that provision is immaterial, and that a person who takes a bill accepted by the Company is not bound to see that it is in a form authorized by the deed of settlement. The 46th section expressly enacts, "that if the directors are authorized by deed of settlement or bye law to issue or accept bills, they shall do so in the manner there prescribed;" and it would be strange to hold that where the directors of a Company have issued bills in the precise form given by the Act, the holders cannot recover because the directors have not issued the bills in a form which is not the form of a bill of exchange at all. A shareholder in these Companies must submit to the ordinary consequences of a partner in an insolvent Company, and it is more reasonable that he should suffer than an innocent party, who takes a bill which is in the form prescribed by the statute.

WATSON, B.—I am of the same opinion. I abstain from expressing any opinion as to the effect of the 44th clause of the deed of settlement; but assuming that it would afford a defence to the action on the bill, it is clear that it cannot now be pleaded to the scire facias.

Judgment for the plaintiff (*a*).

(*a*) See the next case.

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GORDON v. The Official Manager of THE SEA FIRE LIFE  
ASSURANCE SOCIETY.

Jan. 27.

THE declaration stated that John Hooper, as the agent of the Sea Fire Life Assurance Society, registered, on the 3rd of April, 1850, by his bill of exchange, now overdue, directed to the said Sea Fire Life Assurance Society, required the said Society to pay to the order of the plaintiff 50*l.* one month after date, and the said Society accepted the said bill, but did not pay the same.

Pleas.—First, that Hooper, as the agent of the said Society, did not draw the said bill. Secondly, that the said Society did not accept the said bill.

At the trial before *Pollock*, C. B., at the London sittings after Trinity Term, it was proved that the bill was drawn by J. Hooper, the agent of the Company, and accepted by two of the directors of the Company on behalf of the Company, and countersigned by the secretary in accordance with the provisions of the 45th section of 7 & 8 Vict. c. 110. The defendants however relied on the 44th clause of the deed of settlement which was as follows:—“That the directors shall, and they are hereby authorized to make and issue, indorse and accept, in the name of and on account of the Company, such bills of exchange and promissory notes as they may think expedient: provided, that the total amount of such bills and notes, due at any one time, shall not exceed the sum of 100,000*l.*; and all such bills and notes, and no other, shall be so made, issued, indorsed and accepted as to be binding on the Company and on the

The deed of settlement of a Joint Stock Company completely registered, contained a clause authorising the directors to accept bills of exchange: “provided that the bills due at any one time should not exceed 100,000*l.*, and that all such bills should be so made, issued, indorsed and accepted as to be binding on the Company and on the shareholders, and each of them, to the extent of the respective shares held by them in the capital stock of the Company, and no further or otherwise.” The directors of the Company having accepted bills of exchange in the ordinary form, as prescribed by 7 & 8 Vict. c. 110, s. 45:— Held, that the Company was liable upon such bills.

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shareholders, and each of them, to the extent of the respective shares held by them in the capital stock of the Company, and no further or otherwise." It was not proved that the plaintiff had in fact any notice of the contents of the deed of settlement. The jury, under the direction of the learned Judge, found a verdict for the plaintiff; leave being reserved to the defendant to move to enter a verdict for him.

A rule nisi having been obtained accordingly,

*Flood* and *Malcolm* shew cause (a).—The 44th clause of the deed of settlement is a mere contract by the persons constituting the Company, binding upon them as between themselves, but not affecting their liability to strangers. The point has been in substance decided by the Lord Chancellor and the Lords Justices in *Ex parte Greenwood* (b). That case is in accordance with the opinions expressed by *Creanwell*, J., and *Martin*, B., in *Hallett v. Dowdall* (c). *Forbes v. Marshall* (d) shews that the directors had power to bind the shareholders by bills of exchange in this form.

*Bovill* appeared to support the rule, but having argued a similar point in the last case, was not further heard.

Per CURIAM.—We are all of opinion that this rule ought to be discharged, and that the verdict for the plaintiff must stand.

Rule discharged.

(a) Before *Pollock*, C.B., *Martins*, B., and *Watson*, B.  
 (b) 3 *De Gex, McN. & G.* 459.

(c) 18 Q. B. 2.  
 (d) 11 Exch. 166.

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## RUDDOCK v. MARSH.

Jan. 20.

THIS was an action brought in the Court of Record for the trial of civil actions within the city of Manchester.

The declaration was for goods sold and delivered.—Plea: Never indebted. The plaintiff claimed a balance due for goods sold. The goods consisted of flour, cheese, coffee, butter, tea, sugar and other provisions. The defendant's wife, who lived with her husband, had been in the habit of purchasing groceries and provisions for the family at the shop of the plaintiff. The defendant was often employed at a distance from home, and was absent at the time when the debt in question was contracted. The defendant's wife had paid money on account at different times. On cross-examination the plaintiff's wife said: "The defendant's wife told me she got twenty-five shillings a week to keep the house, from her husband and son. When she paid me money she did not say it was out of the twenty-five shillings a week." The defendant proved that he was absent from home sometimes three weeks, sometimes three or four months at a time; that his wages were thirty-four shillings a week, besides an allowance for his expences when away from home. Out of his wages his wife received regularly every Saturday twenty-five shillings to keep the house, in addition to nine shillings and four pence the wages of two of his sons. The defendant purchased all the clothes and shoes required, and paid a subscription to a sick club for all the family.

The Recorder told the jury that the only question he should leave to them was the amount to which in their opinion the plaintiff had established his claim: that the articles furnished to the wife of the defendant were all

A wife is the general agent of her husband with reference to such matters as are usually under the control of the wife. Therefore, where the wife of a labourer incurred a debt for provisions for the use of the family, the husband was held liable, though he had supplied his wife with money to keep the house.

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necessaries, taken to the defendant's house for the sustenance of his household, and there consumed by his wife and children, and by himself when he was at home, and that he was bound to pay for them: that it was no defence to the action, that the defendant had regularly supplied his wife with money sufficient to have kept his house without running him into debt, and that that was all as to which there was any proof: that no notice had been given to the plaintiff, and that there was nothing to bring home knowledge of the fact to the plaintiff.

*Wheeler* had obtained a rule for a new trial on the ground of misdirection, against which

*Griffits* shewed cause (Nov. 21) (a).—The direction of the Recorder was correct in point of law. The question whether a husband is liable for goods supplied to his wife while they are living together, in the several cases which have from time to time come before the Court, has arisen in respect of goods supplied to the wife for her own special purposes. Thus, in *Reid v. Teakle* (b), the debt was for music supplied to her. Here, however, the question arises, which was there suggested by *Jervis*, C. J., whether a husband can repudiate the agency of his wife where the debt is for things which are strictly necessaries. The principle is, that where the wife lives with her husband she is his general agent to purchase goods necessarily required for the use of the family. It is otherwise where the goods are for her own special use. In *Holt v. Brien* (c), the plaintiff had been distinctly informed that he was not to trust the defendant's wife, and that if he did the defendant would not pay his bill. In *Mandy v. Scott* (d), the

(a) Before *Pollock*, C. B., *Anderson*, B., *Bramwell*, B., and *Watson*, B.

(b) 18 C. B. 627.  
 (c) 4 B. & Ald. 262.  
 (d) 2 Smith's L. C. 4th ed. 341.

third resolution (*a*) is, that "if the wife buy anything, and it is found by special verdict that this was consumed in the household, even then the husband shall not be liable for it, but this may be good evidence on which the jury may find that the husband *assumpsit*, though certainly not conclusive," but that doctrine must be taken with reference to the facts. There the action was for the price of mercer's wares, and the defendant had expressly prohibited the plaintiff from supplying his wife. Here the defendant left the management of the house to his wife, and there is no evidence that he ever interfered. [*Bramwell*, B.—Suppose the defendant's daughter had kept his house: do you say he could have been bound by her contracts?] Yes, or by those of a housekeeper; the question turns upon the authority given. There is no suggestion that these articles were not necessary for the maintenance of the family. [*Bramwell*, B.—People have a right to suppose that a wife keeping her husband's house has such authority as is usually given to persons in such a situation. If the husband would limit such authority, he must give notice of the limitation. Then comes the question with respect to the authority of the wife to deal upon credit. If the question arose as to the housekeeper of a gentleman, living in Belgrave Square, I should say, that the person who had authority to order bread for the family had power to incur a debt to the extent of weekly bills. But does that apply to the wife of a labourer? *Alderson*, B.—It seems to me that the Recorder should have left it to the jury to say whether the plaintiff had notice.]

*Wheeler*, in support of the rule.—First, no notice was necessary. In *Montague v. Benedict* (*b*), *Holroyd*, J., says, "Where a tradesman provides articles for a person whom

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(*a*) 2 Smith's L. C. 4th ed. 361. (*b*) 3 B. & C. 631.

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he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not; for where he chooses to trust her, in the expectation that she will pay, he must take the consequences if she does not. The burden of proof of the assent of the husband lies upon the party who provided the goods, and who acted upon the supposed authority." [Alderson, B.—That was an action for the price of trinkets which had been supplied to the wife.] Seaton v. Benedict (a) confirms Montague v. Benedict (b). In Reneaux v. Teakle (c) the goods supplied, which were in fact articles of dress, were found by the jury to be necessities, and therefore, for the purpose of this argument, the same as the provisions supplied here; and the rule which applied in that case must govern the present.

Secondly, there was evidence of notice. It does not distinctly appear at what time the plaintiff's wife was told by the defendant's wife that she had twenty-five shillings a week to keep the house; but it must be taken to have been at the time when the contract was made. [Watson, B.—The Recorder told the jury there was no notice: why did you not object to that at the time? Alderson, B.—I cannot help thinking that there was some evidence of notice; yet the Recorder says there was no notice. It is singular that no time should be stated, the fact being material to the defendant's case. Pollock, C. B.—As a general rule when a fact is proved, and the exact time at which it occurred is not shewn, it may be taken to have occurred at a time when it would not be unimportant.]

Cur. adv. vult.

POLLOCK, C. B., now said.—This was an application for a new trial. The objection taken to the ruling of the

(a) 5 Bing. 28.

(b) 3 B. & C. 631.

(c) 8 Exch. 680.

learned Recorder was, that he had directed the jury that the wife was a general agent for her husband. Without saying that a wife in every case has such authority to bind her husband, we are of opinion that the direction was correct with reference to the circumstances of this case. A partner is a particular kind of agent who has a general authority to bind his partners by contracts made in the course of business; and in like manner a wife has authority with reference to such matters as are usually under the control of the wife. If that authority is broken in upon, it must be by special circumstances which do not appear in the present case.

Rule discharged (*a*).

(*a*) *Waller, App., Drakeford, Resp.*, 1 E. & B. 749.

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COLLIS v. STACK.

Jan. 17.

DECLARATION for money lent.—Plea: the Statute of Limitations.

At the trial before *Wightman*, J., at the last assizes for the county of Monmouth, it appeared that the money sought to be recovered had been lent by the plaintiff to the defendant in the year 1838. As an answer to the Statute of Limitations, the plaintiff put in the following letters:—Feb. 5, 1853. Plaintiff to Defendant.—“I expected you would have taken the earliest opportunity to discharge the debt so long due to me; it is now upwards of 14 years

The plaintiff having applied to the defendant for payment of a debt the defendant wrote in answer, “I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time and all

will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter.”—*Held*, a sufficient acknowledgment in answer to a plea of the Statute of Limitations.

The question in these cases is, whether the statement as to the time of payment is merely an excuse or the condition on which payment is to be made.

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since I lent you 100l." Feb. 6. Defendant to Plaintiff.—“ You have I dare say heard of the failure of two banks, &c. I expect to get the medical superintendence of large iron works, &c. Were it not for unforeseen casualties you should have been repaid before now: ultimately you can't suffer, because my life is insured.—Signed Robt. Stack.” April 16. Defendant to Plaintiff.—“ I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter.—Signed Robt. Stack.” April 21. Defendant to Plaintiff.—“ So far from deeming you impertinent, I look upon your forbearance as very great indeed; bear with me a little longer and all will be right. Things are going on favourably at present. Rest assured of my resolve to respond to your call as soon as it becomes practicable.—Signed Robt. Stack.” The defendant's counsel objected that the letters did not contain an unqualified promise in writing. The jury, under the direction of the learned Judge, found a verdict for the plaintiff; leave being reserved to move to enter a verdict for the defendant.

*Huddleston* having obtained a rule nisi accordingly,

*Whateley* and *Phipson* now shewed cause.—This case is distinguishable from several cases recently before the Court in which “ a hope to be able to pay something” has been held an insufficient acknowledgment. In *Hart v. Prendergast* (*a*), the acknowledgment relied on was merely the expression by the defendant of a hope to be able to pay part of the debt. In *Rackham v. Marriott* (*b*), it was a statement by the defendant that in time he *might* be able

(*a*) 14 M. & W. 741.

(*b*) *Ante*, p. 234.

to propose some arrangement. But in *Edmonds v. Goater* (*a*), the following letter by the debtor, in answer to an application for payment, was held sufficient: "I hope to be in W. very soon when I trust everything will be arranged with Mrs. W. agreeable to her wishes. If anything happens to me you may tell Mrs. W. she is in good hands and will be protected." Here the letter of the 16th of April asks for indulgence in respect of an admitted debt. [*Martin, B.*—It contains what is in substance a promise; the expectation as to the time of performance does not affect the obligation of the defendant. *Pollock, C. B.*—The question in these cases is, whether the statements as to the time of payment are merely excuses for not paying, or whether they are conditions on which payment is to be made.] The acknowledgment here is unconditional, that the money is due and is to be paid; it is a promise and an apology.

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Huddleston, in support of the rule.—The rule has been well settled since the case of *Tanner v. Smart* (*b*), that the acknowledgment relied on as a bar to the Statute of Limitations must be either an absolute promise, or an unconditional acknowledgment from which a promise can be implied, or a conditional promise, in which case the plaintiff must prove the fulfilment of the condition. The defendant says he is not in a condition to pay. The words "all will be right," are the sanguine expression of his expectation that the works he has been appointed to will enable him to pay at a future time. In *Rackham v. Marriott* (*c*) there was an acknowledgment of the existence of the debt; but the Court thought that not sufficient, though coupled with an expression by the defendant of a wish not

(*a*) 15 Beav. 415.

(*b*) 6 B. & C. 603.

(*c*) *Ante*, p. 234.

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to avail himself of the statute, and a hope that future prosperity would enable him to make an arrangement which might prove satisfactory. The whole correspondence must be taken together; the plaintiff cannot rely on an isolated expression in a particular letter, as containing a definite promise, when other parts of the correspondence shew that such was not the meaning of the writer. It was for the jury to say whether or not there was a promise.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. Giving to the letters their fair meaning, that of the 16th of April is sufficient to take the case out of the statute. I agree, that if we could see from the whole tenor of the correspondence, that an expression was used in a different sense from that in which it is ordinarily understood, we might so construe it. But the letter may be taken by itself; and it contains a distinct acknowledgment with a promise to pay. No particular form of words is required to constitute such a promise. "All will be right" must be understood by every body to mean "you will be paid." Without going so far as the Master of the Rolls in the case of *Edmonds v. Goater* (a), the Court may hold this letter to be a binding acknowledgment.

MARTIN, B.—I am of the same opinion. In the letter of the 16th of April the defendant says "all will be right," that means, "I will pay the money." What follows does not qualify the promise. If the case against the defendant rested solely on the letter of the 21st April, it might be difficult to contend that the promise contained in that letter was not conditional.

WATSON, B.—I am entirely of the same opinion, and I
(e) 15 Beav. 415.

will only add, with reference to an observation made during the argument, that the construction of letters of this kind is for the Court.

Rule discharged.

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HART v. DENNY and Another.

JUN. 20.

THIS was an application for leave to plead a special plea in addition to other pleas.

The declaration stated, that in consideration that the plaintiff would enter into the employment of the defendants at a salary of 200*l.* a year, and continue in such service for one whole year, the defendants promised the plaintiff to retain and employ him for the space of such whole year; and that though the plaintiff entered into the service of the defendants, &c., yet the defendants before the expiration of the year wrongfully discharged the plaintiff, &c.

In an action on a contract, a special plea of payment into Court, in respect of the breach of a contract set out in the plea, and varying from that stated in the declaration, cannot be pleaded together with pleas in bar of the action.

The abstract of the pleas was as follows.

First.—Non assumpsit.

Secondly.—Traverse of wrongful dismissal.

Thirdly.—That the employment was upon the terms that the defendants might determine the same by giving three months notice; and that before the 24th of June the defendants gave notice to determine the said service on the 29th of September; and that afterwards and before the 29th of September the defendants paid the plaintiff the sum of 25*l.*, and dispensed with the plaintiff's services for the residue of the said quarter, and the plaintiff accepted the sum of 25*l.* and such dispensation in discharge of all claims.

Fourthly.—That the employment was upon the terms that the defendants might determine the same by giving three months notice; and that before the 24th day of June

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the defendants gave notice to the plaintiff to determine the said service on the 29th of September; and that afterwards and before the 29th of September the defendants paid the plaintiff the sum of 25*l.*, and they bring into Court the sum of 29*l.*, and no damage beyond.

A summons to plead the above matters having been taken out, and the parties having been heard before *Bramwell, B.*, at Chambers, the learned Judge disallowed the proposed fourth plea.—The present application was supported by an affidavit of the defendants, which stated the agreement and notice as set forth in the fourth plea; that in July they paid to the plaintiff 25*l.* in satisfaction of all claims on the part of the plaintiff, which, as they understood, was accepted on that footing; and that afterwards, to avoid litigation, they tendered to his attorney the further sum of 29*l.*, which they now wished to bring into Court.

Needham, in support of the application.—The 71st section of the Common Law Procedure Act, 1852, gives a form, but does not exclude a special plea of payment into Court. The introductory part of this plea shews what is the matter pleaded to.

MARTIN, B.—The plea sets out a contract different from that declared on; it contains a denial of the contract and something more. The defendants cannot be allowed to plead it with the other pleas. Notice may be given to the plaintiff's attorney that the defendants have made the application, and will oppose any application to amend the declaration at the trial.

POLLOCK, C. B., and *WATSON, B.*, concurred.

Rule refused.

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Jan. 27.

MACNAUGHT and Another v. RUSSELL.

DECLARATION by drawers against acceptor of a bill of exchange.

Plea.—That the bill in the declaration mentioned was accepted by the defendant, and taken by the plaintiffs, before the making of the indenture hereinafter mentioned, for and on account of the sum of 420*l.*; and that before and at the time of the making of the deed hereinafter mentioned, and for six calendar months and upwards next immediately before the suspension of payment hereinafter mentioned, the defendant was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of the statute hereinafter mentioned; and that before and at the time of the making of the said indenture, the defendant was indebted to the parties of the third part to the deed hereinafter mentioned, and to divers other persons, in divers sums, and was and would be unable to pay the same

To a declaration on a bill of exchange, the defendant pleaded a deed of arrangement with his creditors under the 224th section of "The Bankrupt Law Consolidation Act, 1849," to which the plaintiffs were not parties. The plea stated, that it was provided by the deed (which was made subsequently to the 12th February, 1856), that the estate of the defendant should be administered, and the assets

payable and distributable amongst the creditors in the same manner as they would be payable and distributable, as if the defendant had been adjudicated a bankrupt on the 12th of February, 1856, and as if the debts of the creditors, parties thereto, had been proved on the said 12th of February. The deed contained a covenant that the creditors, parties thereto, would not commence any proceedings at law or in equity against the defendant on account of their debts, and that if any creditor failed to observe that covenant his debt should be extinguished, and the covenant might be pleaded as a release. The plea averred, that no person became a creditor of the defendant between the 12th of February, 1856, and the time of making the deed; and that three calendar months had elapsed since the plaintiff had notice from the defendant of his suspension of payment and of the deed.

Held, first, that the deed did provide for a distribution of the entire estate and effects of the defendant amongst all his creditors, since the words "as if the debts of the creditors, parties thereto, had been proved on the said 12th of February," did not limit the operation of the previous words, so as to make the estate and effects distributable amongst those creditors only who were parties to the deed.

Secondly, that as the plea averred that no person became a creditor between the 12th of February, 1856, and the time of making the deed, the deed was not open to the objection that it contained no provision in respect of persons who might become creditors in the intermediate time.

Thirdly, that the plaintiff could not object that the covenant not to sue was unreasonable, for he was not a party to it.

Fourthly, that it was not necessary to allege that three months had elapsed since the plaintiff had notice that the deed was signed by six-sevenths of the creditors; since, according to the true construction of the statute, the three months ran from the time that notice was given of the suspension of payment and of the deed of arrangement.

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in full; and the defendant before the time of making the said indenture, and after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849, to wit, on the 1st of February, 1856, as such trader suspended payment, and afterwards by deed of arrangement, made after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849, between the defendant of the first part, S. Beale, T. Grissell and J. Jones of the second part, and the several other persons whose names and seals should be thereunto affixed, being creditors of the defendant of the third part, after reciting (amongst other things) that a meeting of the creditors of the defendant had been held, at which it was unanimously resolved that the affairs of the defendant should be liquidated under the inspection of the said S. Beale, T. Grissell and J. Jones, it was witnessed, that the defendant, for himself, his executors, &c., covenanted with the said parties thereto of the second part, and each of them, their and each of their executors, &c., that the defendant should and would, during the continuance of the then present arrangement, devote the whole of his time and attention to the carrying on certain works therein mentioned, for the purpose of completing the works and contracts on hand &c., for the benefit of his creditors, &c. And it was by the said indenture further declared and agreed that the estate and effects of the defendant should be administered, and the assets should be payable and distributable, to, amongst, and for the benefit of the creditors in the same manner as the same would be payable and distributable, and the same rights and equities should prevail and govern any disputes and questions amongst the creditors in relation to the debts between the creditors and the defendant, *as if he the defendant had become and been adjudicated a bankrupt on the 12th of February, 1856, and as if the respective debts of the creditors, parties thereto, had been the debts duly proved*

under the said bankruptcy on the 12th of February, 1856. And it was further witnessed by the said indenture that each of the creditors, parties thereto, did thereby, for himself, his heirs, executors, &c., covenant, promise, and agree with and to the defendant, his executors, &c., that the said creditors, parties thereto, should not nor would sue, arrest, or cause to be sued, imprisoned or arrested, or commence or prosecute any action or actions, suit or suits, at law or in equity, or other proceedings against the defendant, his heirs, executors, &c., on account of the whole or any part of the debt or debts then due and owing by the said defendant to the said creditors, parties thereto, or any of them and in case they, the said creditors or their representatives, &c., should in any respect fail to observe this covenant, then and in any such case, and immediately thereupon, the debt or debts of the creditor or creditors by whom, or whose representatives, the same covenant should be broken, should become absolutely forfeited or extinguished and altogether irrecoverable in law or equity, and such creditor or creditors should thenceforth cease to be entitled to have, maintain, or make any claim or demand in respect thereof, either by virtue of the said indenture or otherwise, and the said covenant should accordingly operate, and might be pleaded in bar, as a good and effectual release and discharge of such debt or debts and all claims and demands in respect thereof. And it was further declared and agreed by the said indenture, that the said deed was a deed of arrangement within the meaning of the 224th section of the Bankrupt Law Consolidation Act, 1849; and that the 228th section of the said Act should be applicable thereto.—Averments: that no person became or was a creditor of the defendant, between the 12th of February 1856, and the time of the making of the said indenture; and that before the commencement of this suit, to wit, at the time of the making of the said indenture, the same

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was signed and sealed by the defendant, and the parties thereto of the second part; and that divers creditors of the defendant in their own right signed the said indenture and subscribed their names and affixed their seals thereto, &c.: that the said indenture at the time of the making thereof, and at all times, was a deed of arrangement between the defendant and his creditors within the meaning of the Bankrupt Law Consolidation Act, 1849, and that the creditors by whom the same was signed and sealed were six-sevenths in number and value of the creditors of the defendant, within the meaning of the provisions of the said statute, whose debts amounted, within the meaning of the said provisions, to the sum of ten pounds and upwards, accounting every creditor as a creditor in value in respect of such amount only, as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities and liens from the defendant, appeared to be the balance due to him: that the plaintiffs were, at the time of the making of the said indenture, creditors of the defendant in respect of the causes of action in this plea mentioned, within the meaning of the said last mentioned statute; and that at the time of the making of the said indenture, the amount in this plea mentioned was a debt due from the defendant to the plaintiffs within the meaning of the said indenture: that after the suspension of payment hereinbefore mentioned, the plaintiffs were, on the 26th of February 1856, requested by the defendant to sign and execute the same, and might, if they would, have signed and executed the same, as parties thereto of the third part; that *three calendar months have elapsed since the plaintiffs had notice from defendant of his said suspension of payment and of the said deed*: that the defendant has, from the time of the making of the said indenture hitherto in all respects performed and observed the covenants in the

said indenture contained: that the said deed of arrangement still remains in full force, and that by reason of the premises, and by force of the statute, the said indenture has become and is as effectual and obligatory in all respects upon the plaintiffs as if they had duly signed the same; and that by reason of the premises the defendant has become and is released and discharged in manner aforesaid from the cause of action.

Demurrer and joinder therein.

Hugh Hill (*Wordsworth* with him) argued in support of the demurrer (Jan. 21).—The indenture set out in the plea is not a valid deed of arrangement within the 224th section of “The Bankrupt Law Consolidation Act, 1849,” (12 & 13 Vict. c. 106). The plea, indeed, contains an averment that the indenture is a deed of arrangement within the meaning of that Act; but the Court will nevertheless judge of its effects according to its terms. In *Fisher v. Bell* (a) there was a similar allegation, and, notwithstanding, the deed was held invalid. There are several objections to this deed. First, it is well established that such a deed is not binding on those creditors who have not signed it, unless it provides for the entire distribution of all the trader’s estate and effects amongst all his creditors; *Tetley v. Taylor* (b), *Fisher v. Bell* (a), *Larpent v. Bibby* (c), *March v. Warwick* (d). The 228th section provides that the creditors shall have the same rights “as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed in like manner as in bankruptcy.” Therefore the evident intention of the legislature was that the whole of the trader’s estate should be distributed amongst all his creditors. That is not provided for by

(a) 12 C. B. 363.
(b) 1 E. & B. 521.

(c) 5 H. L. 481.
(d) *Ande*, p. 158.

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this deed. The parties of the third part are "the several persons whose names and seals should be thereunto affixed;" and it is declared "that the estate of the defendant shall be administered and the assets payable and distributable amongst the creditors in the same manner as the same would be payable and distributable," as if the defendant had been adjudicated a bankrupt on the 12th of February 1856, and as if the respective debts of the creditors, *parties thereto*, had been the debts duly proved under the said bankruptcy on the said 12th of February 1856." The effect of this clause is that the estate is to be distributed amongst those creditors only who are parties to the deed.—Secondly, though the deed was executed subsequently to the 12th of February 1856, it contains no provision for distribution amongst persons who may have become creditors between that day and the execution of the deed, neither is there any provision in respect of property which the defendant may have acquired in the mean time.—Thirdly, the indenture contains a covenant by the creditors that they will not take any proceedings against the defendant on account of their debts, and that if any creditor shall fail to observe that covenant, his debt shall become forfeited and he shall cease to have any claim under the indenture, and the covenant may be pleaded as a release. *Gibbons v. Vouillon* (a) is an authority that such a covenant may be pleaded in bar. The provision is unreasonable and repugnant to the bankrupt law. A creditor ought not to be required to execute a deed which would place him in a worse position than that in which he would have been if a fiat had issued. Though the certificate may be pleaded in bar, a creditor who sues a bankrupt is not thereby deprived of his right to participate in the undivided assets.—Fourthly, it is not alleged that notice was given to the plaintiffs as required by the 225th section. The plea

(a) 8 C. B. 483.

merely states that three months have elapsed since the plaintiffs had notice of the deed. The plea ought to have averred that three months had elapsed after the plaintiffs had notice that the deed was signed by six-sevenths of the creditors, or that a certificate that it was so signed was granted by the Court of Bankruptcy. The 225th section uses the words "such deed or memorandum of arrangement," that is, a deed signed by six-sevenths of the creditors, as mentioned in the 224th section.

Coleridge (Bovill with him), contra.—First, it is not disputed that a deed of this kind must provide for the complete distribution of the trader's estate and effects amongst all his creditors; but this deed does so provide. It is objected that the provision that the estate is to be distributable, "as if the debts of the creditors, *parties thereto*, had been the debts proved under a bankruptcy on the 12th of February 1856," excludes from a participation in the assets those creditors who were not at the time parties to the deed. But in construing the deed the whole must be looked at, and if it be so read, it is apparent that the intention was to distribute the entire estate and effects of the defendant amongst all his creditors. If such intention does not appear, the deed must be construed with reference to the provisions of the statute. The 224th section declares that the deed shall "be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed, as if they had duly signed the same." The 228th section gives a definition of the persons who are entitled to be called creditors within the meaning of such a deed, viz., "every person who would be entitled to prove in bankruptcy." The deed should be read as if those provisions were incorporated with it, and having been signed by six-sevenths of the creditors, the remainder

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become parties by force of law.—Secondly, the plea contains an express averment that no person became a creditor of the defendant between the 12th of February 1856, and the time of the making of the deed.—Thirdly, the provision which excludes from participation in the assets any creditor, party to the deed, who may sue the defendant, is in accordance with the spirit of the bankrupt law. The 182nd section declares that no creditor who has brought an action against a bankrupt in respect of a demand which might have been proved under the bankruptcy, shall prove a debt under such bankruptcy, or have any claim entered upon the proceedings, without relinquishing such action. If the clause in question were not in the deed, its object would be defeated, for a creditor might first take his chance of benefit under the deed, and then sue for the remainder of his claim. If a creditor has any ground of complaint as to the manner in which the assets are administered under the deed, the 229th section enables him to apply to the Court. [Martin, B.—Suppose the creditor claims 500*l.*, and the trader denies that he owes the creditor more than 300*l.*, is the latter to be deprived of his debt because he seeks to establish his claim by an action? Watson, B.—The effect of this clause is, that though the creditor has reasonable ground for disputing the amount of the debt, if he brings an action that will operate as a release.] The remedy is under the 229th section.—Fourthly, the allegation of notice is in conformity with the language of the 225th section. That section says, that the deed shall be obligatory after notice from such trader of his suspension of payment and of such deed. It does not require that there should be notice that the deed has been signed by six-sevenths of the creditors. In *Phillips v. Surridge* (*a*), Maule, J., expressed an opinion that the effect of the

(*a*) 1 L. M. & P. 458.

statute was, that if six-sevenths of the creditors executed the deed, and notice be given to a creditor who has not signed, the deed is binding on him.

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Hugh Hill, in reply.—First, the defendant's construction of the deed rejects the words, “as if the respective debts of the creditors, parties thereto, had been *the debts* duly proved under the bankruptcy on the 12th of February 1856. —Secondly, no answer has been given to the objection that the deed makes no provision for the distribution of any estate which the bankrupt may have acquired between the 12th of February 1856, and the execution of the deed. The bankrupt may in the intermediate time have acquired some thousands of pounds.—Thirdly, as to the clause of release. The 182nd section declares that the proving a debt under the fiat shall be deemed an election to take the benefit of it. If the creditor elect to sue, he may afterwards come in and prove on abandoning his action, or he may proceed to judgment unless the bankrupt obtains a certificate. This deed deprives a creditor who has signed it of his right to sue for his debt even though six-sevenths of the creditors have refused to sign it.—Fourthly, the deed, to be available under the statute, must be such a one as a creditor having notice of it may reasonably sign.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a demurrer to a plea. The declaration was on a bill of exchange, and the plea was founded upon the provisions of “The Bankrupt Law Consolidation Act, 1849,” relating to arrangements with creditors by deed, being the 224th and following sections. The case was argued before us, and all the cases upon the subject were cited and the principles established by them agreed

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to by the learned counsel on both sides, but the plea was objected to as not being in conformity with them.

The first objection was, that the deed did not provide for a distribution of the entire effects amongst all the creditors, but only amongst those who were parties to the deed. We think this objection is not well founded. The deed itself is not set out. The statement of it in this respect in the plea is, that the estate of the defendant should be administered and the assets payable and distributable amongst the creditors in the same manner as they would be payable and distributable as if the defendant had been adjudicated bankrupt on the 12th of February 1856, and as if the debts of the creditors, parties thereto, had been proved on the said 12th of February. We do not think that these latter words confine the operation of the former, and that upon the true construction of the clause as set out, all the creditors would be entitled to a dividend.

It was secondly objected, that there was no provision for any creditor who might have become such between the 12th of February and the date of the deed, which appears to be assumed to have been subsequent to that day: but as there is an averment in the plea that no person became a creditor in the intermediate time, it seems to us that this is an answer to this objection.

It was thirdly objected, that there was a provision set out relating to creditors not proceeding at law for their debts, which was unreasonable, and which a creditor ought not to be required to enter into. We were at first much struck with this objection, but, upon consideration, we think it is not fatal to the plea. It is expressly confined to the creditors who are parties to the deed. The plaintiffs are in no way bound by it, they became affected by reason of six-sevenths of the creditors having executed the deed, and we do not think that it is of any material consequence to them

that the six-sevenths who have signed have entered into a covenant which may impose a hardship upon them: this was a matter for their consideration, and the plaintiff is in no way injured by their voluntarily choosing to take this obligation upon them. The substantial matter, so far as he is concerned, is his getting the largest possible dividend upon his debt, which this covenant has rather a tendency to secure for him.

It was fourthly objected, that the proper notice required by the 225th section was not averred, viz., that the three months ran from a notice that six-sevenths of the creditors had signed. We think however that the three months run from the time that the notice is given by the trader of the suspension of payment and of the deed of arrangement being prepared and in readiness for execution: this in our opinion is clearly the true construction of the section.

We therefore think that the objections to the plea failed, and the defendant is entitled to our judgment.

Judgment for the defendant.

In the Matter of a Plaintiff, in the County Court of
Bedfordshire, between LAWFORD and PARTRIDGE
and Another.

Jan. 23.

LUSH had obtained a rule to shew cause why a writ of prohibition should not issue, directed to the Judge of the County Court of Bedfordshire, to prohibit the said Court from further proceedings in the above plaint. The plaint and particulars were as follows:—"J. L. Partridge and F. W. Partridge, &c., you are hereby summoned to appear at a County Court, to be holden at, &c., on, &c., to answer S.

In a suit in a
County Court,
when on the
hearing it
appears that
title to land is
disputed, the
Judge has no
power to non-
suit the plaintiff
or to award
costs to the
defendant.

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Lawford, &c., to a claim the particulars of which are hereunto annexed. Dated, &c.

| | £ s. d. |
|--------------------------------|--------------|
| Debt or claim | 4 15 0 |
| Costs of summons and service | 0 7 7 |
| Paying in and stamp . . . | 0 1 1 |
| Total amount of debt and costs | <u>5 3 8</u> |

"In the County Court of Bedfordshire. This action is brought to recover the sum of four pounds fifteen shillings for damages sustained by the plaintiff in consequence of you, the said defendants, having on the 10th day of April trespassed on the premises of the plaintiff at Leagrave, in the county of Bedford, and there cut down and removed a boarded fence of the plaintiff," &c.

The cause came on for trial on the 30th of April, when the plaintiff proved his case; but on an intimation by one of the defendants that the jurisdiction of the Court was objected to, and no attorney for the defendants being present, the case was adjourned. The parties attended on the 30th of May, but the case was not taken. On the 27th of June the plaintiff proved his case; the counsel for the defendants then claimed title to the land on which the trespass complained of was alleged to have taken place, and, after hearing some of the witnesses on behalf of the defendants, the Judge refused to proceed further with or adjudicate upon the case. The counsel for the defendants then applied for costs, and thereupon the Judge ordered the costs of the defendants, their witnesses, counsel and attorney, to be paid by the plaintiff, including fees to counsel for attendance on two several Court days, and the following order was made.

"Upon hearing this cause at a Court holden at the Town Hall, Luton, &c., it is adjudged that judgment of nonsuit be entered, and that the plaintiff do pay the sum of

4l. 10s. 6d. by way of costs and satisfaction for the trouble and attendance of the defendants and their witnesses in that behalf, and *4l. 4s. 9d.* for the costs and charges by the defendants about their suit in that behalf. It is therefore ordered that the plaintiff do pay the same," &c.

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Hugh Hill and Griffis now shewed cause (a).—The first point raised by this rule is, whether a plaintiff ought to pay the costs if he improperly brings a defendant before the Court in a case where the question is one of title to land. The 58th section of the 9 & 10 Vict. c. 95 enacts, "that all pleas of personal actions, where the debt or damage claimed is not more than twenty pounds, &c., may be holden in the County Court without writ;" then follows a proviso, "that the Court shall not have cognizance of any action of ejectment in which the title to any corporeal or incorporeal hereditaments shall be in question." Here on the face of the plaint it appeared that the Court had cognizance of the matter in dispute. The plaint must be considered as containing an allegation that the cause of action was one over which the Court had jurisdiction. The plaintiff did not prove such a case, and therefore the Judge did right in nonsuiting him. The 79th section gives to the Judge the power of pronouncing judgment in this form; it provides that the Judge may nonsuit the plaintiff if he does not make proof of his demand to the satisfaction of the Judge. The satisfaction of the Court must be at the end of the cause; till then no case is proved. If the question of title came upon a plaintiff by surprise, the Judge would not give costs to the defendant. Even if it be considered that the 79th section does not apply, the case was fully heard, and the hearing is a proceeding, in respect of which, by the 88th section, the Judge was empowered to award costs.

(a) Jan. 13. Before Pollock, C. B. and Watson, B.

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The County Court, having jurisdiction on the face of the plaint, had power to enter on the inquiry, and this Court will not interfere to review the decision of the Judge: *Joseph v. Henry* (*a*). In *Ex parte Milner in re Milner v. Rhoden* (*b*), the Judge, at the hearing, considering that he had no jurisdiction to adjudicate between the parties, nonsuited the plaintiff, and the Court declined to interfere.—They also argued that, under the 91st section, the money "claimed" must be taken to include necessary costs, and therefore that the Judge had power to allow the fee to counsel, the sum claimed, including such costs, amounting to *5l. 3s. 8d.*

Lush and *Codd*, in support of the rule.—The case of *Ex parte Milner in re Milner v. Rhoden* (*b*) was not a motion for a prohibition, but for a mandamus, which was refused because the Judge had decided the question submitted to him. The right to costs must rest wholly on the power given by this statute to the Judge to award costs. There are many analogous cases where a defendant can recover no costs. If upon plea of ancient demesne a cassetur breve is entered, the defendant gets no costs. *Pocklington v. Peck* (*c*). [*Pollock*, C. B.—The objection to the jurisdiction does not appear till the parties have been heard; it is as if there were pleadings *ore tenus*. After a prohibition the Judge can do nothing, not even give costs.] The want of jurisdiction does not appear on the face of the plaint, and in fact the plaintiff may not know that title will be set up. A judgment in the old County Court, after a plea raising a question of title, was simply void: *Cannon v. Smallwood* (*d*); *Tinniswood v. Pattison* (*e*). The 58th section

(*a*) 1 L. M. & P. 388.

Hill v. Shepherd, 12 Mod. 145.

(*b*) 15 Jur. 1037.

(*d*) 3 Lev. 203.

(*c*) 1 Stra. 638. See Com. Dig.

(*e*) 3 C. B. 243.

Ancient Demesne (F. 5), *Green-*

defines the jurisdiction ; the 79th and 88th sections apply only where the Judge has jurisdiction.—They also argued that the Judge had not power to allow the fees to counsel, upon the ground that the words "where less than five pounds is claimed," in the 91st section, refer to the actual amount which the plaintiff claims to put into his own pocket.—On this point they cited *Mayer v. Burgess* (a).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a motion for a prohibition to the County Court of Bedfordshire. The plaint was in trespass, the claim was 4*l.* 15*s.* damages, costs 7*s.* 7*d.*, together 5*l.* 2*s.* 7*d.*; the defendant at the hearing set up title to the land, and objected that the County Court, under the 58th section of the 9 & 10 Vict. c. 95, had no cognizance over the case, as the title to land came in question; upon which the Judge of the County Court decided that the title to land was in question and directed a nonsuit, and awarded costs to the defendant. A rule nisi was obtained for a prohibition on two grounds; first, that the County Court Judge had no power to award costs; and, secondly, that the costs awarded were not such as he had the power to award on a claim for damages below 5*l.*, under the 91st section of the same Act. As our decision is in favour of the motion on the first point, it will not be necessary to give any opinion on the second. The case was fully argued before us and we are of opinion that the rule must be made absolute, as we think that the County Court had no jurisdiction to award costs in the present case. By the 58th section of 9 & 10 Vict., above mentioned, it is provided that the County Court shall not have cognizance of any suit when title to land comes in

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question. In this case the title to land did come in question. It is clear that, unless empowered so to do by some legislative provision, there was no power to award costs or proceed further after the want of jurisdiction was established. The case of *Cannon v. Smallwood* (a), and other authorities to that effect were cited. It was contended on the part of the defendant, that by the Act, 9 & 10 Vict. c. 95, s. 79, the power to award costs in such case is given. That enactment is, "that if the plaintiff shall not make proof of his demand to the satisfaction of the Court, it shall be lawful for the Judge to nonsuit the plaintiff, or to give judgment for the defendant; and in case where the defendant shall appear and shall not admit the demand, to award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as the Judge in his discretion shall think fit, and such sum shall be recoverable from the plaintiff, by such ways and means as any debt or damage ordered to be paid by the same Court, can be recovered." We think that this enactment does not empower the Judge to nonsuit and award costs when the case is out of his jurisdiction, but that his power to nonsuit is confined to cases over which the Court has jurisdiction; for the plaintiff might be able conclusively to prove the causes of action mentioned in the summons but for the objection to the jurisdiction on the part of the defendant. The Court had merely power to declare its own incompetency to try and direct that the suit should abate; for the plea to the jurisdiction is only in abatement of the suit. It was contended during the argument that if the Judge had taken time to consider, and in the mean time a prohibition had gone from one of the superior Courts, he could not have proceeded to award or enforce the payment of costs. We think that is so, and it furnishes a strong argument that

(a) 3 Lev. 203.

the legislature never intended that the County Court Judge should have jurisdiction to give costs in a case like the present. We are of opinion for the same reasons, that the provision over costs in the 88th section of the same Act only applies to cases within the jurisdiction of the County Court to hear and determine.

By the last County Court Act, 19 & 20 Vict. c. 108, s. 42, the declaration in cases of prohibition to the County Court is taken away, and the superior Court must determine on rule whether a prohibition should go or not. We are therefore of opinion that a prohibition must go.

Rule absolute.

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DUDDEN v. THE GUARDIANS OF THE POOR OF THE  
CLUTTON UNION.

JAN. 22.

THE declaration stated that the plaintiff was possessed of a mill, and by reason thereof was entitled to the water of a certain stream in the usual and accustomed flow and channel to the said mill, without obstruction by the defendants, for working the same, and also to the water issuing and flowing from a certain spring which fed the said stream, without diminution by the defendants. Breach: That the defendants wrongfully diverted the flow of the stream, and wrongfully diminished the water issuing from the said spring by constructing certain tanks and water-works.

Pleas:—First, not guilty: Secondly, that the plaintiff was not entitled as alleged.

At the trial before *Channell*, Serjt., at the last assizes for the county of Somerset, it appeared that the plaintiff was the owner of a mill situated on a stream which rises near

The water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose: Held, that an action lay by the mill owner against the person so abstracting the water.

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a place called the Holly Marshes. Prior to 1852, a spring called "The Red House Spring," which rose from the earth in a field belonging to Captain Scobell, after a short course fell into the stream on which the plaintiff's mill was situated. It was proved that about the year 1835, the tenant of the field had slightly altered the course in which the water after rising from the spring flowed to the stream, and that before such alteration, the current from the spring flowed across the adjoining field to the same stream in a crooked channel or gully, in which watercresses grew, and trout had been caught in summer close up to the spring head. The Clutton Union Workhouse is about a mile to the north of the spring. The workhouse not being properly supplied with water, in 1852 the guardians of the poor of the Clutton Union obtained from Captain Scobell a grant of the use of the spring, and caused works to be constructed for supplying the workhouse with water from the spring. These works consisted of a tank which was sunk to a considerable depth in the earth at the source of the spring, and received the whole of the water as it issued from the earth; from thence a line of pipes conveyed the water from the tank to the workhouse. The overflowings of the tank ran through the channel to the stream. The jury having viewed the premises of the plaintiff, the spring and the works of the defendants; the learned Judge told them that the questions for their consideration were, whether there was a natural or defined watercourse from the spring head to the stream, and if so, whether the defendants had diverted the water from this watercourse: that if the water was only spread over the land, Captain Scobell might drain his land, or licence the defendants to do so for him. The jury found a verdict for the plaintiff; the learned Judge reserving leave to the defendants to move to enter a nonsuit.

A rule having been obtained for that purpose,

*Montague Smith* and *Prideaux* now shewed cause.—This was a natural stream from the spring head itself running in a natural and defined course. That distinguishes this case from *Broadbent v. Ramsbotham* (a). In *Dickinson v. The Grand Junction Canal Company* (b), it was held that an action lay for abstracting water, which never did actually form part of a stream, where it was intercepted in its course by the works complained of, whether the water was part of an underground watercourse, or merely percolated through the strata. That case, therefore, goes much further than it is necessary to do here in order to sustain this verdict.

*Kinglake*, Serjt., and *Edwards*, contra.—The question is, what is the right of the owner of the land on which a spring rises to the use of the water at the spring head. A man who has water on his land has a right to the whole of it till it begins to run in a natural channel, that is, in a watercourse between banks. In *Rawstron v. Taylor* (c), *Parke*, B., says “the plaintiff has no right to the rain water which flows from a particular spot to his land,” and asks “if there is any authority for saying that spring water differs in this respect from rain water.” In that case water had always risen to the surface as long as any one could recollect. There had generally been a drinking place for cattle formed with stones, and the overflow of the water went down to a ditch, and thence into a watercourse to the plaintiff’s reservoir, yet it was held that the defendant was not liable to the plaintiff for having deprived him of the use of such water, he having diverted it by draining his land for

(a) 11 Exch. 602. (b) 7 Exch. 282.

(c) 11 Exch. 369, 378.

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the purpose of getting rid of the water, and of supplying another portion of his property with it. [Pollock, C. B.—The real question is, whether there is a natural watercourse which, but for the acts done by the defendant, would have conveyed water to the stream, and from thence to the mill of the plaintiff. If there is a natural spring, the water from which flows in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors. When the stream is above ground, a grant must be presumed, not only of the thing itself, but of all things necessary to the complete enjoyment of it. If the channel or course underground is known, as in the case of the river Mole, it cannot be interfered with. It is otherwise when nothing is known as to the sources of supply; in that case, as no right can be acquired against the owner of the land under which the spring exists, he may do as he pleases with it, and if in mining or draining his land he taps a spring, he cannot be made responsible.] The whole of the judgment in *Dickinson v. The Grand Junction Canal Company* (a) relates to the right to water after it has actually risen to the surface. Here the spring is cut off before it comes to the surface.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. The law of the case is clear and undoubted. This was a natural spring, the waters of which had acquired a natural channel from its source to the river. It is absurd to say that a man might take the water of such a stream four feet from the surface.

MARTIN, B.—I am of the same opinion. The owners of lands adjoining a stream, from its source to the sea, have a natural right to the use of the water of it. A river

begins at its source, when it comes to the surface, and the owner of the land on which it rises cannot monopolize all the water at the source so as to prevent its reaching the lands of other proprietors lower down.

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WATSON, B.—There was ample evidence to go to the jury. This was an ancient spring with which the defendants had no right to interfere. It is clear that they could not have diverted it at ten yards from the source, and the stoppage at the spring head is just as much a diversion as if the water had been taken lower down.

Rule discharged.

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DENISON v. HOLLIDAY and Others.

Jan. 22.

EJECTMENT to recover possession of seams of coal S. D., being seized in fee of certain lands under which were mines of coal, in June, 1805, mortgaged in fee the lands and mines to T. T. to secure 550*l.* and interest. S. D. by her will, dated the 15th September, 1809, devised to her seven children, as tenants in common in fee, all the mines under the said lands, and all her real estates (except the said mines) to J. S., W. W. and W. D., their heirs and assigns, upon trust to sell the said real estates (except as before excepted). On the 26th December, 1812, S. D. devised to J. S. and W. W. two seams of the coal under the said lands for a term of fifty years at a rent of 10*l.* S. D. died in 1814, and the rent was paid to her seven children. T. T., the mortgagee, by his will, dated the 17th October, 1810, devised all freehold estates held by him in mortgage to J. H. and J. J., their heirs and assigns, and soon after died. By indentures of lease and release, the latter dated 10th June, 1815, between J. S., W. W. and W. D., devisees and trustees named in the will of S. D., of the first part, J. H. and J. J., trustees and executors named in the will of T. T., of the second part, J. T. (a mortgagee of other premises) of the third part, and B. K. of the fourth part: after reciting (*inter alia*) the mortgage by S. D. to T. T., and that J. S., W. W. and W. D., in execution of the trusts of the will of S. D., had put up for sale by auction the lands comprised in the said mortgage, at which sale B. K. was declared the purchaser of the said lands (except the mines and beds of coal under the same) for the price of 1149*l.* 15*s.*; it was witnessed that J. H. and J. J. (at the request and by the direction and appointment of J. S., W. W. and W. D.) did bargain, sell, release, &c., unto B. K. the said closes of land, "together with all and singular the out-houses, buildings, gardens, &c., waters, water courses, &c., quarries" (omitting the word "mines"), except and always reserved, unto the said J. S. and W. W. during the term of thirty years, all the mines and beds of coal under the said closes of land with liberty to dig and sink pits, &c., for working the coal: to hold the said closes of land (except as before excepted) unto the said B. K., his heirs and assigns for ever:—*Held*, that under this conveyance the mines or seams of coal did not pass to B. K.

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Upper Royd, the Middle Royd, the Low Royd and the Long Royd, which were formerly in the tenure and occupation of Sarah Denison, and are situate in the township of Drighlington, in the county of York. The defendants appeared and defended for the whole of the premises mentioned in the writ.

The cause came on to be tried before *Platt*, B., at the Yorkshire Summer Assizes, 1855, when a verdict was found for the claimant, subject to the opinion of the Court upon the following case.

Sarah Denison, being seised in fee simple of the several closes hereinafter mentioned, by indentures of lease and release, bearing date respectively the 4th and 5th October, 1793, made between the said Sarah Denison, of the one part, and N. Nicholls, of the other part, did grant, bargain, sell, release, and confirm unto the said N. Nicholls, his heirs and assigns, all the four several closes or parcels of land described in the writ of ejectment in this action, together with all the hereditaments and appurtenants thereof: habendum to the use of the said N. Nicholls, his heirs and assigns for ever, subject to a proviso for redemption by the said Sarah Denison, on payment of 550*l.* and interest, at the time and at the rate therein mentioned.

By indentures of lease and release, bearing date respectively, the 7th and 8th June, 1805, the latter made between N. Nicholls, of the first part, the said Sarah Denison, of the second part, and Timothy Topham, of the third part, the said four closes of land with the appurtenances, were granted, released, and transferred unto and to the use of the said Timothy Topham, his heirs and assigns, discharged of the proviso for redemption in the above indenture mentioned, but subject thereto on payment by Sarah Denison, to Timothy Topham, of 550*l.* and interest, on a day therein mentioned, which not having been paid,

the estate and interest of the said Timothy Topham, in the said mortgaged premises became absolute at law.

Sarah Denison remained in possession of the mortgaged premises, and wrought the coals therein for several years after the date of the mortgage to N. Nicholls.

By her will duly executed and attested as required by law to pass real estates of inheritance, and dated 15th September, 1809, Sarah Denison bequeathed (*inter alia*) as follows:—"All and every the mines, veins, beds, and seams of coal, lying within and under divers lands and grounds of and belonging to me in the township of Drighlington, which I have demised to William Woodhead, for a long term of years, subject to the payment to me, my heirs and assigns, of the yearly rent of 105*l.*, I give, devise, and bequeath unto and equally amongst my seven children (naming them), absolutely and for ever, according to the nature thereof respectively, they my said children and their several heirs, executors, &c., to take and hold the same as tenants in common, and not as joint tenants; and all and every my messuages, cottages, lands, tenements and hereditaments, situate in the township of Drighlington aforesaid (save and except the said mines, veins, bed and seams of coal hereinbefore specifically devised and disposed of), I give and devise unto and to the use of John Scholefield, William Woodhead, and William Denison, their heirs and assigns, upon trust, that they my said trustees shall, after my decease, sell and dispose of the same messuages, cottages, lands, &c. (except as before excepted)."

The claimant in this action Joshua Denison, is the grandson of Thomas Denison, who was the eldest son of the said Sarah Denison, and as such is heir at law of the said Sarah Denison. The said John Scholefield and William Woodhead, the devisees of Sarah Denison, died, the former in the year 1825, the latter in the year 1840,

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leaving William Denison, their co-trustee, them surviving. The said William Denison died in the year 1852, never having been married, and intestate as to any trust estates then vested in him. The claimant is his heir at law.

By indenture of lease, dated the 26th December, 1812, and made between the said Sarah Denison, of the one part, and John Scholefield and William Woodhead, of the other part, the said Sarah Denison granted and demised to the said John Scholefield and William Woodhead, all those two several mines, veins, beds, or seams of coal (commonly called the stone coal and the first black coal) lying and being within and under those five several closes or parcels of land called the Upper Royd, the Middle Royd, the Low Royd, and the Long Royd, and the Rough Pasture, and also within and under those four several other closes, the estate of Mr. Hudson, three of the closes being called the Royal Closes, and the other Whitley Park: with the liberties, powers, &c., of raising and landing the seams of coal, &c.: habendum, from the 1st January, then next for the term of fifty years, at the yearly rent of 105*l.* for the first twenty-one years of the term, to be increased upon more than an acre of the coal being worked. The two seams of coal thus demised were wrought by the lessees till about fifteen years ago: a part of each of the said seams of coal, and of those portions thereof under the four closes mentioned in the writ of ejectment, is still unwrought.

Sarah Denison died in 1814, without having revoked or altered her will. The steward to Scholefield and Woodhead, while they worked the mines, paid the rent to the seven devisees under her will.

The said Timothy Topham, by his will duly executed and attested as by law to pass real estates of inheritance, and dated the 17th October, 1810, devised all such freehold

estates as then stood conveyed to him in mortgage to James Harpham and Joseph Jackson, their heirs and assigns. The said Timothy Topham died soon after making his will without having revoked or altered the same.

By indenture of release (*a*) of four parts, dated the 10th June, 1815, and made between the said John Scholefield, William Woodhead, and William Denison, devisees and trustees named in the will of Sarah Denison, of the first part, the said James Harpham and Joseph Jackson, trustees and executors named in the will of the said Timothy Topham, of the second part, John Taylor, of, &c. (who was a party to the said indenture as mortgagee of other premises therein conveyed) of the third part, and Benjamin King, of, &c., of the fourth part: after reciting (inter alia) the mortgage in fee by Sarah Denison to N. Nicholls, the assignment of that mortgage to Timothy Topham, the will of Sarah Denison and her death, the will of Timothy Topham and his death: and further reciting that the said John Scholefield, William Woodhead, and William Denison, in pursuance and execution of the trusts vested and reposed in them by the will of the said Sarah Denison, caused an auction to be held at the house of, and for the sale of the real estates of the said Sarah Denison, and, amongst them, of the several closes or parcels of land or ground, tenements and hereditaments comprised in the said several mortgage securities, at which sale the said Benjamin King was the highest bidder for and was declared the purchaser of the same, &c. (save and except the mines and beds of

(*a*) The plaintiff's counsel, in the course of the argument, referred to the lease dated 9th June, which contained the following exception:—"Save and except and always reserved unto the said J. Scholefield and W. Woodhead,

their executors, &c., during the term of thirty years, to be computed from the 1st January now last past, all mines and beds of coal lying and being within and under the said several closes of land or ground."

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coal lying and being within and under the said closes or parcels of land or ground) at and for the price of 1149*l.* 15*s.*: also reciting that the said John Scholefield and William Woodhead are now become possessed of and legally entitled to the said mines and beds of coal, so excepted as aforesaid; "also reciting that the said principal sum of 550*l.*, and no more, was then due and owing to the said James Harpham and Joseph Jackson upon the said mortgage security to the said Timothy Topham; it was by the said indenture witnessed, that for and in consideration of the sum of 550*l.* (part of the said purchase money) by the said Benjamin King, at the request and by the direction of the said John Scholefield, William Woodhead, and William Denison (testified by their respectively being parties to and executing the said indenture), in hand well and truly paid to the said James Harpham and Joseph Jackson; and also for and in consideration of a certain other sum of money (residue of the said purchase money) to the said *John Scholefield, William Woodhead, and William Denison*, in hand, well and truly paid, they the said James Harpham and Joseph Jackson (at the request and by the direction and appointment of the said John Scholefield, William Woodhead, and William Denison, testified as aforesaid), did by the said indenture bargain, sell, release and confirm, and the said John Scholefield, William Woodhead, and William Denison, and each and every of them, did grant, bargain, sell, alien, release, ratify and confirm unto the said Benjamin King, his heirs and assigns (amongst other tenements and hereditaments), all the several closes or parcels of land described in the writ of ejectment in this action, together with all and singular houses, outhouses, edifices, buildings, gardens, yards, fronts, frontsteads, ways, paths, passages, waters, watercourses, ditches, drains, fences, *quarries*, woods,

underwoods, commons, and right and title of and to common liberties, easements, profits, privileges, advantages, emoluments, and appurtenances whatsoever to the said several closes of land or ground, tenements, and hereditaments, hereinbefore mentioned and intended to be hereby granted and released, or any part thereof, respectively belonging, or in anywise appertaining" (all which said closes, &c., were then in the actual possession of the said Benjamin King by virtue of a bargain and sale thereof, &c.), "and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and of every part thereof respectively; and all the estate and estates, right, title, interest, term and terms for years, use, trust, possession, property, claim and demand whatsoever, as well legal as equitable, of them the said John Scholefield, William Woodhead, William Denison, James Harpham, Joseph Jackson (and John Taylor) respectively, of, in, to, or out of the same closes or parcels of land, &c., every or any part thereof respectively, and all deeds, &c., save and except, and always reserved unto the said John Scholefield and William Woodhead, their executors, &c., during the term of thirty years, to be computed from the 1st day of January now last past, all the mines and beds of coal lying and being within and under the several closes or parcels of land or ground hereinbefore described, and hereby, or mentioned and intended to be hereby, granted and released, together with full and free liberty and authority to and for the said John Scholefield and William Woodhead respectively, and their several executors, &c., and his, their, or any of their agents, servants, colliers, workmen, and labourers, and every of them, from time to time and at all times during the term aforesaid, to bore, try, search for, work, dig, sink, sough for, get, raise, and land all or any part of the said excepted mines and beds of coal; and also all the

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mines and beds of coal lying or being within and under a certain close of land the estate of Luke Crosby, called the Lower Grey Stone, and also within and under four several other closes or parcels of land the estate of William Hudson, and now respectively called the Three Royds and the Whitley Park, all situate within Darlington aforesaid, and to make, dig, break, or sink any pit or pits, shaft or shafts, level or levels, sluice or slnices, and any other act or acts, device or devices whatsoever needful or necessary for the searching for, finding, working, raising, landing, and laying of the said coal ; and also for the conveying from the work or works which shall be erected or used in or about, or in respect of, the same mines or beds of coals, or any of them, all such water or waters as are or shall be prejudicial to the same work or works ; and also together with full and free liberty, power, and authority to and for the said John Scholefield and William Woodhead respectively, and their several executors, &c., and their, or any of their, servants, agents, and workmen, to rank, stack, and lay, as well the said coal so to be landed and raised as aforesaid as also all the stone, earth, rubbish, slack, metal, and refuse which shall be wrought, dug, raised, or landed in the searching for or working the said mines or beds of coals, or any part thereof respectively ; and to continue the same so ranked, stacked and laid during their or any of their free will and pleasure, in or upon the said three first mentioned closes or parcels of land or ground called the Royds (the land under which the seams of coal in question are), or any part thereof respectively, and also full and free liberty, power, and authority to and for the said John Scholefield and William Woodhead respectively, and their several executors, &c., and his, their, or any of their agents, servants, and workmen, to take lead and carry away, as well the said coal so to be raised and landed as aforesaid as also all the stone,

earth, and slack, metal, and refuse so to be wrought, dug, raised, and landed as aforesaid, by means of ways and roads to be made by them, or any of them, in, through, and over the said three last mentioned closes of land or ground, or any of them, or any part or parts thereof respectively: So always and upon this express condition, that no coal shall be got under the said messuage or dwelling house hereby, or mentioned and intended to be hereby, released or otherwise assured; nor shall any pit or shaft be made, sunk, or opened, or any roads or ways be made or used in, upon, or over either of the said closes or parcels of land or ground called the Long Royd and the Old Pasture; nor shall the soil or surface thereof, or of any part thereof respectively, be dug, taken up, broken, or in anywise injured for the purpose of getting, leading or carrying away the said mines or beds of coal or any part thereof, or for any other purpose whatsoever; and so as and upon this further express condition, that the said John Scholefield and William Woodhead respectively, and their several executors, &c., and their and every of their agents, servants, and workmen, do, or cause, or permit, or suffer to be done, as little hurt or damage to the said Benjamin King, his heirs and assigns, and the owner or owners, and occupier or occupiers, for the time being respectively of the said closes or parcels of land or ground, tenements and hereditaments hereinbefore mentioned and intended to be hereby released or otherwise assured, as they possibly can on the occasions aforesaid, and so as and upon this further express condition, that the said John Scholefield and William Woodhead, their executors, &c., do and shall pay and make to the said Benjamin King, his heirs and assigns, and the owner or owners, and occupier or occupiers for the time being of the same closes or parcels of land or ground, tenements and hereditaments, such satisfaction as hereinafter is covenanted to be made

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out and paid, not only for the damage to the herbage but for damage or spoil of ground and soil, or otherwise to be occasioned by the winning or working of the said mines or beds of coal, or any of them, or by the landing, stacking and carrying away the coal to be won, raised, and got as aforesaid, or by using or exercising all or any of the liberties, powers, and privileges hereby reserved: *To have and to hold the said several closes or parcels of land or ground, messuage or dwelling house, and all and singular other the tenements and hereditaments hereinbefore described and mentioned, and intended to be hereby released or otherwise assured, with their and every of their appurtenances (except as before excepted and subject as aforesaid), unto the said Benjamin King, his heirs and assigns, to the only proper use and behoof of the said Benjamin King and of his heirs and assigns for ever."*—There were covenants by John Scholefield and William Woodhead with Benjamin King, that they would during the term of thirty years win the coal in a workmanlike manner and leave sufficient support for the surface, and pay a surface rent, and that it should be lawful for Benjamin King to inspect the mines, &c.

The defendants claim the seams of coal, possession of which is sought to be recovered in this action, under the said conveyance to Benjamin King; and for the purpose of this case the claimant admits that they have a good title to all that passed to Benjamin King, by that conveyance. Benjamin King, and those claiming and who now claim through and under him, have been in possession of the surface of the lands conveyed by the indenture of the 10th of June, 1815, ever since the date of that deed. The defendants began working the third seam of coal on the lands conveyed to B. King in the year 1851.

J. Harpham, one of the trustees and devisees of J. Topham, died in the year 1820, leaving J. Jackson his cotrustee

him surviving. J. Jackson, by his will duly executed, &c., and dated the 21st of February, 1829, devised to his wife and W. Bottomley, their heirs and assigns, all the messuages, lands, &c., which at the time of his decease should be vested in him upon any trusts or by way of mortgage. The said J. Jackson died in 1841, without having revoked or altered his will.

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By indenture dated the 11th of June, 1855, and made between the said W. Bottomley of the one part, and the said Joshua Denison, the claimant in this action, of the other part, it was witnessed that in consideration of 5*l.*, W. Bottomley, as surviving trustee, did thereby grant, release and convey unto Joshua Denison, his heirs and assigns, all and every the said mines, beds, veins or seams of coal, lying and being within and under all those three closes in the township of Drighlington in the county of York, commonly called or known by the name of the Royds, and of and in all that close or parcel of ground commonly called or known by the name of the Long Royd: habendum unto Joshua Denison, his heirs and assigns, to the uses and upon the trusts of the thereinbefore recited will of the said Sarah Denison deceased, and of the deed of conveyance to the claimant of the 10th of June, 1815.

The question for the opinion of the Court is, whether the claimant is entitled to recover possession of all or any of the seams of coal mentioned in the writ of ejectment; and if the Court shall be of opinion that he is so entitled, then the verdict for the claimant is to stand; but if the Court shall be of a contrary opinion, then a nonsuit is to be entered.

Hayes, Serjt., (*Malcolm Kerr* with him) argued for the plaintiff (January 19).—The plaintiff is entitled to recover all the seams of coal. The apparent intention of the parties was that the mines should not pass by the release of the

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10th of June, 1815, to Benjamin King, through whom the defendants claim. That indenture recites that Benjamin King was the purchaser of the lands, except the mines and beds of coal under the same. Even if the exception had been omitted, the mines would not have passed, it appearing from the recital that it was the intention of the parties that they should not pass. It is merely a presumption of law that a conveyance of *land* includes not only the surface, but everything over and under it. The general words of a conveyance may be controlled by a particular recital. In *Doe d. Freeland v. Burt* (a), it was held that a demise of premises, part of which was a yard, did not pass a cellar under the yard, it appearing to have been the intention of the parties that the cellar should not pass. Here the recital distinguishes the land from the mines, and consequently the latter will not pass. The exception of the mines for the term of thirty years is to Scholefield and Woodhead, who had no legal estate, but only an equity of redemption; and therefore it could not operate as an exception or reservation properly so called, for an exception can only be in favour of the party conveying the legal estate: *Shep. Touch.* 77; *Co. Lit.* 47 a; *Chetham v. Williamson* (b). But as Benjamin King is a party to the indenture, the exception might, as against him, operate as a new grant of the mines: *Wickham v. Hawker* (c). The object of the exception was to grant to Scholefield and Woodhead, who were lessees of two of the seams, certain surface rights, so that they might effectually work the coal. That construction may be put on the exception consistently with every provision in the deed. Moreover, a conveyance by lease and release is founded on the possessory estate arising from the bargain and sale; but here

(a) 1 T. R. 701.

(b) 4 East, 469.

(c) 7 W. & W. 63.

the lease excepts the mines of coals for thirty years, and consequently the release cannot operate on them.

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Atherton (*Cleasby* with him), for the defendant.—The intention of the parties must be ascertained by the application of the ordinary rules of construction. The conveyance of the 10th of June, 1815, contains words sufficient to pass the land from the surface to the centre. It is true that Scholefield and Woodhead were parties to that conveyance, but they were inoperative parties, since they had no legal estate. It is clear that this exception is not an exception or reservation properly so called: *Wickham v. Hawker* (a); *Graham v. Ewart* (b). Then, what is its effect? Under the conveyance in question, the legal estate in the mines passed to B. King, and the exception operated as a grant from King to Scholefield and Woodhead, of all the mines for a term of thirty years. That term having expired, the property in the mines vests in the defendant, who claims through King. The lease of the 26th of December, 1812, from Sarah Denison to Scholefield and Woodhead, and which she granted after her mortgage in fee, did not include the seams of coal, which are the subject of this action, and that lease would not expire until January 1863. Therefore Scholefield and Woodhead, who previously to the conveyance of the 10th of June, 1815, had no legal estate either in the mines or the surface, but only an equitable interest for a certain term in two of the seams of coal, obtained by that conveyance, as an equivalent for such interest, a lease of all the mines for a term of thirty years, with surface rights to enable them to work the coal. It is not unreasonable to suppose that they agreed to accept a lease for a shorter period with additional rights, in lieu of their equitable interest for the term of fifty years. The

(a) 7 M. & W. 63. (b) 11 Exch. 326. In error, ante, p. 550.

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words, "except the mines" in the recital, are explained by the exception in the conveying part of the deed. If those words had been omitted in the recital, there would have been no difficulty. The rule, that general words in a deed may be qualified by a recital, does not apply here, because the amount of interest created by this deed is defined. The legal estate in both the land and mines being in the trustees of Topham, it was competent for them to convey both to a purchaser, and they have used words sufficient for that purpose. Unless the mines passed, no effect can be given to the exception.

Hayes, Serjt., replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This is an action of ejectment which was tried before Sir *Thomas Platt*, at the Yorkshire Summer Assizes, 1855: a verdict was entered for the plaintiff, subject to a special case. The ejectment was brought to recover the possession of several seams of coal under certain lands in that county. The question depends entirely upon the construction of a conveyance by lease and release. The release is dated the 10th of June, 1815; but in order to its right understanding, it is essential to state with precision the interests of the several parties to it.

One Sarah Denison was originally seised in fee simple of the lands under which the seams of coal are; and by indentures of lease and release, the latter bearing date the 8th of June, 1805, to which she was a party, they, including the coal, were conveyed to one Timothy Topham, as mortgagee in fee, to secure the payment of 550*l.* and interest.

Sarah Denison, being the owner of the equity of re-

demption, by her will duly executed and dated the 15th of September, 1809, devised to her seven children as tenants in common in fee all the mines, veins, beds and seams of coal lying within and under the said lands and others, and which by the will she stated to have been demised to one William Woodhead, his executors, &c., for a long term of years, subject to a yearly rent of 105*l.* There was no other evidence given at the trial in regard to this term alleged to have been granted to William Woodhead. By a subsequent part of her will, she devised all her real estate (save and except the said mines, veins, beds and seams of coal theretofore specifically devised), to John Scholefield, William Woodhead and William Denison, their heirs and assigns, upon trust to sell the said real estate (except as before excepted), and to stand possessed of the purchase money upon certain trusts.

On the 26th of December, 1812, by an indenture of that date, made between Sarah Denison of the one part and the said John Scholefield and William Woodhead of the other part, Sarah Denison demised to Scholefield and Woodhead two seams of the coal lying under the said lands, together with various rights incidental to the getting or winning of it, for the term of fifty years from the 1st day of January then next, at a rent of 105*l.* certain for the first twenty-one years of the term, to be increased upon more than an acre of the coal being worked. The lessees worked these two seams of coal until about fifteen years ago, and Sarah Denison having died in 1814, the rent continued to be paid to her seven children under the devise in her will.

Timothy Topham, the mortgagee, by his will duly executed and bearing date the 17th of October, 1810, devised all freehold estates, held by him in mortgage to James Harpham and Joseph Jackson, their heirs and assigns, and soon after died.

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This being the state of things, the conveyance by lease and release before mentioned, was executed, and the question now in controversy between the parties depends upon its construction. It is expressed to be made between the said John Scholefield, William Woodhead, and William Denison, the devisees and trustees named in the last will of the said Sarah Denison, of the first part, the said James Harpham and Joseph Jackson, trustees and executors named in and by the last will of Timothy Topham of the second part, John Taylor (who was a mortgagee of certain other premises) of the third part, and Benjamin King of the fourth part; and the contention on behalf of the defendants is, that by this conveyance the seams of coal now sought to be recovered were conveyed to Benjamin King, and it is agreed that if they were not the plaintiff is entitled to recover.

The release begins by reciting the mortgage in fee created by Sarah Denison, and that the estate so created was then vested in James Harpham and Joseph Jackson: there is then a recital as follows:—"That the said John Scholefield, William Woodhead and William Denison, in pursuance and execution of the trusts vested and reposed in them by the will of the said Sarah Denison, caused an auction to be held at the house of, &c., for the sale of the real estates late of the said Sarah Denison, and amongst them of the several closes or parcels of land, &c., comprised in the said mortgage; at which sale the said Benjamin King was the highest bidder for, and he was declared the purchaser of the said lands (save and except the mines and beds of coal lying and being within and under the same) at and for the price or sum of 1149*l.* 15*s.*, and that the said John Scholefield and William Woodhead are now become possessed of and legally entitled to the said mines and beds of coal so excepted as aforesaid." It was further recited that the said principal

sum of 550*l.*, and no more, was then due and owing to the said James Harpham and Joseph Jackson upon the said mortgage security to the said Timothy Topham; and it was by the said indenture witnessed, &c. (His lordship then read the parts of the indenture above set forth, p. 636).—There are then contained in the release a variety of covenants from John Scholefield and William Woodhead to Benjamin King, for the winning of the coal in a workmanlike manner, for the leaving props for preventing injury to the surface; that it should be lawful for King to inspect the mines, and in fact the same as are usually found in the demises or grants of coal by the owners of land to lessees.

The case has been argued before us, and we are of opinion that the plaintiff is entitled to our judgment. It was agreed on both sides, that the exception to Scholefield and Woodhead of the mines and seams of coal under the lands, for the term of thirty years, could not be, and was not, an exception or reservation properly so called. An exception must be to the person or persons who convey the legal title, and to him or them alone: *Cheetham v. Williamson* (*a*); and this being reserved to Scholefield and Woodhead, who had no legal estate but only an equity of redemption, it could not operate as an exception or reservation; but the release having been executed by Benjamin King, it might have operated as a new grant from him of the mines or seams of coal to Scholefield and Woodhead, provided the same were conveyed to and vested in him by the indenture of release of the 11th of June, 1815, and it was the true intention of the parties as expressed in the deed that it should so operate: *Wickham v. Hawker* (*b*). It is quite clear, however, that if the mines or seams of coal were not vested in him he could not grant them, for it is essential to a grant that the thing granted should be vested in the grantors.

(*a*) 4 East, 469.

(*b*) 7 M. & W. 63.

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We entirely agree with the learned counsel for the defendant, that a deed must be construed and taken to mean that which its terms express; and that it is the intention of the parties as expressed which must be the construction. But in this case we think the intention as expressed is really pretty clear. The vendors were Scholefield, Woodhead and Denison, the trustees under Sarah Denison's will. The release states that they were so, and that they as such caused the sale to be made. It states in the most express terms that what they agreed to sell, for the purchase money of 1149*l.* 15*s.*, was the lands, excepting the mines and beds of coal under them. Indeed this is all they could sell. The land, minus the coal, being what was devised to them. It is quite true that the legal owners of the lands, including the coal, were the devisees of Timothy Topham, viz., James Harpham and Joseph Jackson, and they were necessary parties to convey a legal title to Benjamin King; but their only real interest in the subject matter of the sale was to the extent of 550*l.*, being less than one-half of the purchase money of the land, minus the coal; and provided they were paid this, the sale and everything connected with it was immaterial to them. They, being paid, join in the conveyance, and they convey the lands, "together with all and singular houses," &c., in the terms usually found in conveyances, except that using the word "quarries" they omit the word "mines," which is usually to be found in conveyances of the entire corpus of the land in connection with the word "quarries." If therefore the release had ended where the so-called exception begins, we entertain no doubt that the intention of the parties as expressed in the deed was, that the lands, minus the mines or seams of coal, were alone conveyed. This would be in accordance with the recital as to the thing purchased; and "quarries" being expressed and "mines" excluded in the description of the subject matter conveyed,

it seems to be clear that the mines of coal did not, and were not intended to pass to the purchasers: expressio unius est exclusio alterius.

But then follows the exception which is relied upon by the defendants. It would be sufficient for the determination of this case to say, that upon the true construction of the release the mines or seams of coal were not conveyed to Benjamin King; but it is satisfactory to be able to give the probable explanation of this latter part of the instrument. It is to be observed that the exception is not to the three vendors, Scholefield, Woodhead, and Denison, but to the two former only. These two were the grantees in the lease of the 26th of December, 1812, made by Sarah Denison, of the two seams of coal; but she at the time was only owner of an equity of redemption, and could give no legal title whatever as against the mortgagee or his devisees. It is true that they were only lessees of two of the seams, but in the release it is recited that they are possessed of and legally entitled to all the coal, and possibly were thought to be so. They naturally would be desirous of obtaining a good legal title to work under their lease, and we entertain no doubt that all this latter part of the release was introduced in order to obtain from the legal owner of the surface the right to effectually work the coal, which they had not then vested in them by reason of the defect of title of Sarah Denison. The devisees of Timothy Topham, or Benjamin King possibly objected to give the right for more than thirty years, which was about eighteen years less than the term created by their lease of 26th December, 1815; but we entertain very little doubt that however inartificially and clumsily the intention and object was carried out, this really was what was intended by the parties by the latter part of the deed. It may have been, and probably was, a breach of trust on the part of Scholefield

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and Woodhead, thus to stipulate for their own private benefit, but this is no reason why we should strain the words of a conveyance for the purpose of giving to Benjamin King, or the defendants who represent him, the mines and seams of coal which it is clear he never bought or paid for. All the collateral circumstances stated in the case shew to demonstration that it was never supposed by any one that Benjamin King bought and had conveyed to him the mines or seams of coal; if he had, he would in substance have been entitled to the rent of 105*l.* per annum, but he never was paid any of it; on the contrary, it was paid to the seven children of Sarah Denison, and it is stated in the case that the person entitled under the will of Timothy Topham, had for a nominal consideration, lately conveyed the coal to the plaintiff (who represents Sarah Denison), obviously shewing that he considered that it had not been conveyed to Benjamin King, by the release of the 10th of June, 1815.

We, however, rest our judgment entirely upon the construction of the instrument as expressed in it, and are of opinion that the plaintiff is entitled to recover possession of all the seams of coal mentioned in the ejectment, subject to the equitable interests created by the grant of the 26th of December, 1812.

Judgment for the plaintiff (*a*).

(*a*) The direction of the Court, in this case, (*ante*, p. 61) to the effect that a suggestion should be entered of the death of the claimant before argument of the special case would seem to be erroneous. When the case was called on, and it appeared that no suggestion had been entered, the Lord Chief Baron said, that the proper course was to proceed with the argument, and after

the Court had decided whether the verdict should stand or not, to enter up judgment *nunc pro tunc*; if the judgment was for the claimant the heir could then suggest the death and his own heirship; if a judgment of nonsuit was entered, the defendants might suggest the death of the claimant and proceed against his executors for their costs of suit: *Ex relatione, Malcolm Kerr.*

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IN RE CROSS.

Jan. 20.

MC'OUBREY, on a former day in this term (January 18), had moved for and obtained a writ of habeas corpus, directed to the keeper of the City of London House of Correction at Holloway, commanding him to have the body of Thomas Cross, and the original warrant of commitment made by the Right Hon. Thomas Quested Finnis, Lord Mayor of the City of London, before this Court. The prisoner was now brought up in custody, and the commitment returned and read. It alleged that the prisoner "on the 24th day of December instant, in the said City (of London), being a suspected person and reputed thief, frequenting the public streets and places of and in the said city, then and there was found in 'Railway Place,' being a public thoroughfare, and one of the places of public resort of and in the said city, with intent feloniously to steal the monies, goods and chattels of Sarah Seymour, from her person."

A commitment, under the 5 Geo. 4, c. 83, s. 4, alleged that the prisoner, "being a suspected person and reputed thief frequenting the public streets of the city, then and there was found in Railway Place, being a place of public resort within the city, with intent feloniously to steal," &c.:—
Held, sufficient.

McOubrey moved that the prisoner should be discharged.—The 5 Geo. 4, c. 83, s. 4, enacts "that every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit a felony, &c., shall be deemed a rogue and vagabond." Here the commitment is bad, because it does not appear that the prisoner *frequented* "Railway Place." Vagrancy is of the essence of the offence. It is not enough to justify a commitment under this section, that a suspected thief should be once found in a place of

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public resort. The section is highly penal, and has been construed with great strictness. In one case, *In re Jones* (*a*), it was held that it was not sufficient to state that the prisoner, being a suspected person, "did unlawfully frequent a certain street" with intent to commit a felony. The words "found in" are used in the clause immediately preceding that under which the prisoner has been convicted: "Every person found," that is once found "in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden or area, for any unlawful purpose." There is therefore a distinction between the words;—"found in" and "frequenting" do not mean the same thing.

Hugh Hill appeared to support the conviction, but was not called upon.

POLLOCK, C. B.—I am of opinion that the commitment is sufficient, and that the prisoner must be remanded.

MARTIN, B.—The offence seems exactly that which the statute points at. A reputed thief, frequenting Fleet Street, cannot escape by going down Inner Temple Lane to commit a felony. It is alleged that the prisoner was in "Railway Place," a place of public resort, with intent to commit a felony.

WATSON, B.—Taking the whole conviction together, it appears that the prisoner, being a reputed thief frequenting public places of the city, then and there was found in one of the places of public resort of the city with intent to commit a felony. I think that is sufficient.

Prisoner remanded.

(*a*) 7 Exch. 586.

1857.

FRESHNEY and Another v. CARRICK and Another,
Assignees of HAGESTADT, a Bankrupt.

Jan. 27.

TROVER for a billiard table, household furniture, the furniture of a dram shop, shelves, gas fittings, counters, linen, ale, brandy, gin and wine.—Plea: not possessed. Whereupon issue was joined.

At the trial before *Willes*, J., at the last Yorkshire Summer Assizes, it appeared that the defendants were the assignees of one John Arendt Hagestadt, a bankrupt. The plaintiffs proved that the bankrupt was indebted to them on an account for wines and spirits sold and money lent; and that, being so indebted, he did by indenture dated the 2nd of January, 1855, bargain, sell and assign to the plaintiffs the goods, utensils, implements and things enumerated in a schedule thereunder written, and all the goods, &c., in and about a certain public-house (being the goods and fixtures for which the action was brought), to have and to hold to the plaintiffs, their executors, &c., subject to the proviso for redemption thereafter contained, that is to say, “that if, on demand in writing, to be signed by the plaintiffs or the survivor of them, &c., to be given to the bankrupt, his executors, &c., or left at his usual or last place of abode in England, or at any other time, the bank-

A trader by deed assigned his goods by way of mortgage, subject to a proviso, that it should be lawful for him to hold and make use of the goods, until default in payment of the money secured, after demand in writing. The mortgagee allowed the trader to continue in possession of the goods until after his bankruptcy:—*Held*, that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the 125th section of the Bankrupt Law Consolidation Act.

An action of trover having been brought against the assignees of a bankrupt, who had taken goods out of the possession of the plaintiffs, the defendants proved that before the mortgage to the plaintiffs the bankrupt had assigned certain goods, included in the mortgage to the plaintiffs, to W., and that W. having allowed the goods to remain in the order and disposition of the bankrupt until after the date of the fiat, an order was made by the Commissioner in Bankruptcy for a sale of the goods, under the 125th section of the Bankrupt Law Consolidation Act, 1849:—*Held*, that W. was the true owner, and that the assignees, having a good title as against the true owner, had a right as against the plaintiffs to set up W.’s deed, and the title acquired by them by reason of the goods having been left by W. in the order and disposition of the bankrupt.

An order under the 125th section of the 12 & 13 Vict. c. 106, is sufficient, if it specifies the goods ordered to be sold, without referring by name to the persons supposed to be the true owners of such goods.

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rupt should pay, or cause to be paid, to the plaintiffs the sum of 100*l.*, with interest, &c., and the balance that might be due from the bankrupt to the plaintiffs on the account current for wines, &c., and should in the mean time pay the interest half-yearly, &c.; then upon such payment or payments the said indenture, and every article, clause and thing therein contained, should cease and determine and be absolutely void, anything thereinbefore contained to the contrary notwithstanding." The deed contained a covenant for the payment of the money upon demand in writing; and it was thereby further agreed and declared, "that any furniture, stock, goods, &c., which should be placed upon the said premises during the continuance of the said security, either in lieu of, or in addition to, any of the furniture, &c., then standing or being there, &c., should be deemed to be included in the security intended to be thereby made and subject to the proviso:" Provided always, &c., "that it should be lawful for the bankrupt, his executors, &c., peaceably and quietly to hold, possess, and make use of the said goods, chattels, and premises thereby assigned until default in payment of the said sum of 100*l.* and interest, or of the said balance on such account current, or some part thereof, contrary to the proviso or covenant for payment of the same, without interruption or disturbance by the plaintiffs." And it was further provided, "that it should be lawful for the plaintiffs, or the survivor of them, &c., at any time or times thereafter while the said sums, &c., should remain due or owing to the plaintiffs, without any further consent on the part of the bankrupt, his executors, &c., to sell and dispose of the said goods, chattels and premises assigned, &c., provided, &c.; that the plaintiffs, &c., should not execute the power of sale unless and until they should have previously given a notice in writing to the

bankrupt, &c., to pay off the monies, and default should have been made in payment of such monies for the space of twenty-four hours."

This deed was duly registered pursuant to the 17 & 18 Vict. c. 36, on the 8th of January, 1855. On the 10th of May, 1855, at ten minutes to three o'clock in the afternoon a demand of payment of the money due under the deed was served by the plaintiffs at the dwelling-house of the bankrupt. At a quarter past three a bailiff was placed in possession under the mortgage deed on behalf of the plaintiffs. About twenty minutes afterwards the messenger of the Court of Bankruptcy entered and seized the goods. The warrant of seizure was dated the 10th of May, Hagestadt having been adjudicated a bankrupt about twelve o'clock on that day, on his own petition, which bore date the 9th of May.

For the defendants it was proved that the bankrupt had assigned to one Ward all the goods and chattels comprised in the mortgage to the plaintiffs, except some gas fittings fixed up by screws of the value of 10*l.*, and other goods of the value of 15*l.* By the deed of assignment to Ward, which was dated the 4th of October, 1852, the bankrupt conveyed and assigned to Ward the goods, chattels, fixtures and effects therein particularly mentioned, to hold to Ward and his executors, subject to a proviso that if he the bankrupt, his executors, &c., paid, or caused to be paid, to Ward or his assigns the sum of 230*l.*, with interest, either before or at any time when the same should be demanded, then Ward should reassign the goods to the bankrupt, &c., and the bankrupt covenanted to warrant the goods to Ward: provided, that if default should be made in payment of the sum of 230*l.*, then it should be lawful for Ward to sell the goods. After the seizure by the messenger in bankruptcy

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the following order for the sale of goods was made by Mr. Commissioner Ayrton under the 125th section of the Bankrupt Law Consolidation Act.

“The Bankrupt Law Consolidation Act, 1849.

“In the Court of Bankruptcy for the Leeds district.

“In the matter of John Arendt Hagestadt, of the town or borough of Kingston-upon-Hull, licensed victualler, a bankrupt.

“Before Mr. Commissioner Ayrton.

“Whereas it has been satisfactorily shewn to me, the said Commissioner, that the above named bankrupt hath, at the time he became bankrupt, by the consent and permission of the true owner thereof, in his possession, order or disposition the several goods and chattels herein-after particularly set forth, whereof he the said bankrupt was reputed owner, that is to say, two store casks, &c. (specifying all the goods). And whereas application having been made to me by the assignees of the estate and effects of the said bankrupt, by Charles Preston their attorney, for an order of the above named Court for the sale and disposal of the said goods and chattels, and of all other the goods, stock in trade and effects whereof the said bankrupt was possessed at the time of his bankruptcy, for the benefit of the creditors under the bankruptcy: Now, therefore, upon hearing the said application of the said Charles Preston, as such attorney as aforesaid, and having been duly satisfied as to the facts above mentioned, I do hereby order the said goods and chattels, stock and effects, to be sold and disposed of for the benefit of the creditors under the bankruptcy of the said J. A. Hagestadt.”

The jury, under the direction of the learned Judge, found a verdict for the plaintiffs for the sum of 169*l.*, leave being reserved to the defendants to move to reduce the damages,

or to enter a verdict for them ; the court to be at liberty to draw any inference of fact.

Manisty having obtained a rule nisi accordingly.

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Hugh Hill and Unthank now shewed cause (a).—First, as to the goods and chattels assigned to Ward. The defendants claim under the bankrupt, and can therefore take nothing to which the bankrupt was not entitled ; consequently they cannot set up Ward's title. The plaintiffs having been in possession of the goods when the defendants took them, the defendants as against them were wrongdoers. In *Jeffries v. The Great Western Railway Company* (b), the plaintiff was in possession of goods which he claimed as his own property under an assignment to him from one Owen. The defendants seized the goods in the plaintiff's possession, claiming them also under an assignment from Owen, of a later date than the assignment to the plaintiffs, but made while Owen was in the apparent ownership of the goods. The defendants offered as a defence to prove that Owen had become bankrupt before the plaintiff took possession, and that the goods were at the date of the bankruptcy in his order and disposition, with the consent of the plaintiff, and therefore vested in the assignees before the conversion ; but it was held that the defendants being wrongdoers, and not claiming in any way under the assignees, could not set up the title of the assignees. Here the defendants cannot be said to claim under Ward in any sense ; they claim adversely to him. [*Martin*, B.—The defendants were not wrongdoers, they were doing what the law directed them to do. The seizures by the defendants and the plaintiffs were in fact contemporaneous.]—Then as to the fixtures not included in the bill of sale to Ward, it is clear that the reputed ownership clause does not apply to fixtures, and

(a) Before *Pollock*, C. B., and *Martin*, B. (b) 5 E. & B. 802.

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therefore the plaintiffs' title to them is good: *Boydell v. M'Michael* (*a*). [*Pollock*, C. B.—That point is clear.]—Then as to the goods not included in the bill of sale to Ward. These goods were not in the order and disposition of the bankrupt with the consent of the true owner. The 125th section of the 12 & 13 Vict. c. 106, does not apply unless the owner has a right to immediate possession. In *Fenn v. Bittleston* (*b*), A. by deed, dated in 1845, conveyed certain goods to B., subject to a proviso that if he should pay B. the sum thereby secured on the 22nd of March, 1850, or at such earlier day as B. should appoint, giving fourteen days' notice, the conveyance should be void, and it was agreed that until default in payment after fourteen days' notice it should be lawful for A. to hold and enjoy the chattels. A. continued in possession till December, 1849, when he became bankrupt, and his assignees sold the whole of the chattels, on the ground that they were in the reputed ownership of A. at the time of his bankruptcy. No demand of the money due had been made on A. by B., the mortgagee, or by the plaintiffs, the assignees of B. It was held that trover lay by the assignees of B., against the defendants, the assignees of A., the bankrupt. If the doctrine of order and disposition was applicable, where the mortgagee has no immediate right of possession, that case could not have been so decided. There is nothing improper in a trader agreeing by deed to be allowed the possession of chattels mortgaged by him. All that the plaintiffs had was a sort of reversionary interest; they had no title to the possession of the goods until after default had been made in payment. [*Martin, B.*—It is like a conveyance of the whole property and a redemise to the mortgagor.]—(On this part of the case they

referred also to *Bradley v. Copley* (*a*). Moreover no valid order of the Commissioners has been made directing the assignees to sell the goods. Therefore an action lies by the owners against the assignees; *Heslop v. Baker* (*b*). In *Quartermaine v. Bittleston* (*c*), an order by a Commissioner in bankruptcy, "that all goods and chattels which at the time the said Edward Cuff became bankrupt, were by the consent or permission of the true owner thereof in the possession, order or disposition of the said Edward Cuff, whereof the said E. Cuff was reputed owner, or whereof he had taken upon himself the sale, alteration or disposition as owner, should be disposed of by the assignees," was held not to be in compliance with the 125th section, because it did not specify the particular goods which were to be sold. From the principle of the decision in that case, it follows that the Commissioner must decide upon the claim of the owner of each parcel of the goods, and the order must shew that he has so adjudicated.

Manisty, in support of the rule.—The conveyance to Ward was an absolute assignment, with a proviso for reassignment. In *Fenn v. Bittleston* (*d*), there was an assignment and reassignment to the bankrupt for a term certain. The case of *Jeffries v. The Great Western Railway Company* (*e*) is distinguishable from this. Ward was here the true owner; the defendants have a good title against him. The plaintiffs have no legal interest, but merely an equity of redemption. If the defendant's title is good as against Ward, it is good against all the world. Then, taking it that the plaintiffs were the true owners, the title of the defendants accrued while the bankrupt was in pos-

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| (<i>a</i>) 1 C. B. 685. | (<i>c</i>) 13 C. B. 133. |
| (<i>b</i>) 6 Exch 740. See also
8 Exch. 411. | (<i>d</i>) 7 Exch. 152
(<i>e</i>) 5 E. & B. 802. |

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session by the permission of the plaintiffs, and before they took possession. [*Pollock, C. B.*—Can a person to whom a trader has made a grant of his goods by way of mortgage, allow the trader to remain in possession until after his bankruptcy, and then defeat the title of the assignees? *Unthank* referred to *Fenn v. Bittleston* (*a*).] In that case the point was not taken, and in fact it appears that no order for sale had been made under the 125th section. Here the order under the 125th section for the sale of the goods is sufficient, because it specifies all the goods which were to be sold. It is very different from the general order in *Quartermaine v. Bittleston* (*b*). The gas fittings were merely fixed by screwing them on to the extremities of the pipes, they were not fixtures.

POLLOCK, C. B.—I am of opinion that the verdict must be reduced to the sum of 10*l.* It appears to me that these gas fittings are fixtures not affected by the clause relating to goods in the order and disposition of a bankrupt, but may be disposed of in the same way as realty, of the nature of which they partake. The title of the plaintiffs in respect to them is perfect. As to the other things mentioned in the bill of sale, the plaintiffs, by agreeing to leave the bankrupt in possession, did not prevent their passing to the assignees as having been in the order and disposition of the bankrupt with the consent of the true owner, and the assignees were justified in treating them as having passed under the fiat. The question whether the assignment to Ward can be set up by the assignees is one of some nicety. Ward was the true owner, and the assignees would have had a right to say that they had a good title as against him. If he was the only person concerned it would have been clear. Then there is no doubt that though they claim adversely,

(a) 13 C. B. 138.

(b) 7 Exch. 152.

they claim in a certain sense consistently with Ward's deed; they make his deed a step in their title.

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MARTIN, B.—The adjudication of bankruptcy took place on the 10th of May; and the rights of the assignees must be governed by the state of things at that time. The bankrupt was in possession of certain goods by virtue of the provisions of a deed dated January 2, 1855, which was an absolute assignment of all his property to the plaintiffs. This deed made the plaintiffs the true owners of the goods; but they were to cease to hold them upon the performance by the bankrupt of a condition subsequent. The deed contained a stipulation "that it should be lawful for the bankrupt, his executors, &c., peaceably to hold, possess and make use of the said goods, chattels and premises thereby assigned, until default should be made in payment of the sum of 100*l.* and interest," &c. Whether the bankrupt was reputed owner is a question of fact. The deed provides for it; and that provision seems the very thing contemplated by the statute. The object of the Act is, that if the true owner permits another person to have possession as reputed owner, he must take the consequences of it, and in the event of a bankruptcy the creditors become entitled to the goods. As to setting up the *jus tertii* I always agreed with the Court of Queen's Bench. Here, however, Ward was the true owner, and if the assignees make out their title as against the true owner, they give themselves title as against all the world. Then as to the order: it follows the words of the Act, and unless there are cases directly the other way, we are bound to hold that it vests the goods mentioned in it in the assignees. In *Quartermaine v. Bittleston* (a), there was a general order not giving particulars of the goods; the Court of Common Pleas held that it was bad, and

(a) 13 C. B. 133.

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rightly so. The attention of the Commissioners ought to be called to the particular goods, but the order need not state that it is made against different parties, some of whom claim one part, some another part of the goods.

Verdict to be reduced to 10*l.*

JAN. 14.

SPRINGBETT v. KING.

On an application for costs, under the County Court Act, 15 & 16 Vict. c. 54, s. 4, it is sufficient for the plaintiff to establish a *prima facie* case, so as to call on the defendant for an answer. Therefore where the plaintiff's affidavits disclosed some evidence that the defendant did not dwell or carry on his business within the jurisdiction of the County Court within which the cause of action arose, and it appeared that after diligent inquiries that the plaintiff was unable to ascertain the residence of the defendant, and his attorney refused to give any information.—*Held*, that there was sufficient ground for an order that the plaintiff should recover his costs.

THIS was an action for assault, which was tried before Pollock, C. B., at the Middlesex sittings after last Michaelmas Term, when a verdict was found for the plaintiff with 40*s.* damages, and the learned Judge refused to certify for costs. A summons was afterwards taken out, calling on the defendant to shew cause why the plaintiff should not recover his costs, on the ground that there was a concurrent jurisdiction. The application was supported by the joint affidavit of the plaintiff and a clerk of his attorney, in which the plaintiff deposed "that the assault was committed at his residence, 4, York Terrace, which was within the jurisdiction of the Clerkenwell County Court of Middlesex: that the defendant, as the deponent believed, did not carry on any business, but was a clerk in the employ of Mr. W. Hay, of Albany Street, Regent's Park, in the county of Middlesex, distiller, which place was within the jurisdiction of the Bloomsbury County Court of Middlesex."—The clerk of the plaintiff's attorney deposed, "that he called at the distillery of Mr. W. Hay for the purpose of ascertaining the residence of the defendant, and a porter informed him that the defendant had, in the books of Mr. Hay, described himself as residing at 4, Saint John's Wood Road, in the

county of Middlesex, and as the defendant had not altered the same, the porter further informed deponent that to the best of his belief the defendant still resided there : that deponent went to 4, Saint John's Wood Road, and was informed by a servant that the defendant did not live there, and she refused to give deponent any further information : that he made diligent inquiry in the neighbourhood, and ascertained that the defendant had up to a short time previously lived at 4, Saint John's Wood Road, but had removed : that deponent had since used every effort and made every inquiry, but had been unable to discover the present residence of the defendant." The plaintiff also deposed that he had made the most rigid inquiries and had done every thing in his power to ascertain the residence of the defendant, but had not succeeded : that his attorney wrote to the defendant's attorney, stating that the plaintiff had been given to understand that the defendant resided within the jurisdiction of either the Marylebone or Bloomsbury County Courts, and requesting him to inform him of the residence of the defendant at the time the writ issued : that the defendant's attorney wrote in answer, "My client declines to render any assistance." The affidavit also stated that the deponents believed that, at the time the action was commenced, the defendant resided at 4, Saint John's Wood Road, in the county of Middlesex, which is within the jurisdiction of the Marylebone County Court of Middlesex.

In answer, there was an affidavit of one Edmunds who deposed that he had been intimately acquainted with the defendant for upwards of three years, and that the defendant did not within that time or since reside or carry on his business at 4, Saint John's Wood Road, in the county of Middlesex.

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The summons was heard before *Bramwell*, B., who considered that there was evidence that, at the time the action was commenced, the defendant resided within the jurisdiction of the Marylebone County Court, and he accordingly made an order that the plaintiff should recover his costs.

C. Pollock now moved for a rule to shew cause why the order of *Bramwell*, B., should not be rescinded, on the ground that the plaintiff's affidavit did not sufficiently establish a concurrent jurisdiction.—The 15 & 16 Vict. c. 54, s. 4, enables the Court or a Judge to order that the plaintiff shall recover his costs, if he shall make it “*appear to the satisfaction*” of the Court or a Judge that the action was brought for a cause in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95. The question is, whether a plaintiff is bound to shew affirmatively facts which establish such concurrent jurisdiction, or whether it is sufficient to make out a *prima facie* case, so as to call on the defendant for an answer. Under the London Small Debts Act, 15 & 16 Vict. c. lxxvii., s. 119, the Court of Common Pleas held that the plaintiff must shew with “*reasonable certainty*” that the case is within the exception: *Shepherd v. Baker* (a). In this case the affidavit of the plaintiff does not disclose the defendant's place of residence, but alleges an inability to do so. [*Bramwell*, B.—I thought there was some evidence that the defendant resided within the jurisdiction of the Marylebone County Court.] *Room v. Cottam* (b) and *Fry v. Whittle* (c) are authorities that the affidavit ought to shew distinctly where the defendant resided at the time the action was commenced. There the affidavits followed the language of

(a) 16 C. B. 544.

(b) 5 Exch. 820.

(c) 6 Exch. 411.

the Act, but the Court considered that insufficient. If it were enough to make out a *prima facie* case, the affidavits in *Room v. Cottam* and *Fry v. Whittle* established it.

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POLLOCK, C. B.—We cannot grant a rule, since it appeared to the satisfaction of the learned Judge that it was a case of concurrent jurisdiction.

WATSON, B.—In the cases of *Room v. Cottam* and *Fry v. Whittle* the party who made the affidavit had a perfect knowledge of the circumstances. Here the plaintiff is unable to ascertain with certainty the residence of the defendant, and the defendant refuses to give him any information.

BRAMWELL, B.—I acted on the principle, that the plaintiff was bound to give some evidence which, unanswered, would shew that he was entitled to costs; and I thought that he had done so. It seemed to me that there was evidence which ought to be satisfactory, unless the defendant answered it. In the cases of *Room v. Cottam* and *Fry v. Whittle* every word of the affidavits might have been true, and still there was no ground for depriving the plaintiff of costs.

Rule refused.

1857.

Jas. 20.

THE OXFORD, WORCESTER AND WOLVERHAMPTON RAILWAY COMPANY v. T. E. SCUDAMORE, Secretary of the Rhymney Iron Company.

A notice to admit documents pursuant to the Common Law Procedure Act, 1852, s. 117, called on the defendant to admit the authority by which the documents were written.—*Held*, that the party called on to make the admissions had a right to reject the whole, and having done so, and a verdict having been obtained by the defendant, the plaintiffs who proved these documents at the trial, had no right to the costs of such proof under the section in question.

Each admission sought is to be treated as a separate part of the notice.

THIS was an application for a rule to shew cause why the Master should not review his taxation.

The cause was tried before *Pollock*, C. B., at the sittings in London after Trinity Term, July 3, 1855, when a verdict was found for the defendant. After the taxation of the defendant's costs, the plaintiffs claimed to be allowed the costs of proving certain documents mentioned in the plaintiffs' notices to admit, which the defendants had refused to admit, and which had been proved at the trial at an expence of 106*l*. The defendant's solicitor opposed the allowance of such costs, and subsequently obtained a certificate from the learned Judge, dated the 13th of November, "that as the notices to admit called on the defendant to admit more than mere handwriting, the refusal to admit the documents was reasonable." The documents mentioned in the notices were numbered respectively from 1 to 75. The notice was in the following form:—

Take notice, That the plaintiffs in this cause propose to adduce in evidence, &c.

- | ORIGINALS. | DATE. |
|--|-----------------------|
| 1. Letter or tender written and sent by the defendant as the secretary of the Rhymney Iron Company, and by the authority of the last mentioned Company, to the directors of the Oxford, Worcester and Wolverhampton Railway Company. | 13th
May,
1851. |

- | | | |
|---|-----------------------|--|
| 7. Certificate signed by R. Duncan of the receipt
of rails from the Rhymney Iron Company for
the plaintiff at the Rhymney Wharf at New-
port.

22. Certificate signed by John Fowler, the plain-
tiff's engineer in chief, that the Rhymney
Iron Company might receive 2000 <i>l.</i> in antici-
pation of future certificates for rails. | 20th
Nov.
1851. | 1857.
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HAMPTON
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| | 9th
June,
1852. | |

Quain, in support of the application (*a*).—First, the 117th section of the Common Law Procedure Act, 1852, and Reg. Gen. Hilary Term, 1853, r. 30, provide that either party may call on the other party, by notice, to admit any document, saving all just exceptions; and in case of refusal or neglect to admit the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or inquisition the Judge or presiding officer shall certify that the refusal to admit was reasonable. The Judge has no power to certify except at the trial. [*Pollock*, C. B.—That argument will not help the plaintiffs; if they asked for too much in these notices, they did not bring themselves within the statute.] Even supposing that a party is asked to admit something which it is not strictly reasonable that he should be called upon to admit, the statute expressly contemplates that such party may except to the notice. The plaintiffs are not entirely to lose the benefit of their notice, and be put in the same position as if no notice at all had been given, because their notice is open to some objection. [*Pollock*, C. B.—Persons who ask for something to which they are entitled as matter of right must ask for it simply, and not include something else in their demand. In all, or nearly

(*a*) Nov. 21. Before *Pollock*, C. B., *Alderson*, B., and *Bramwell*, B.

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OXFORD,  
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AND WOLVER-  
HAMPTON  
RAILWAY CO.  
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SOUDAMORE.

all the instances, the admission sought would have involved an admission of authority. Under such circumstances the other party is not bound to demur to part of the admission and admit the rest. *Alderson*, B.—Each document is to be judged of as a separate part of the notice. The notice is divisible.] (The case stood over, *Pollock*, C. B. undertaking to look through the notices).

*Cur. adv. vult.*

POLLOCK, C. B., now said.—We think that in this case no rule ought to be granted. The plaintiffs applied to the defendant to admit certain letters and other documents, which the defendant refused to do. The parties came before me, and I thought that the defendant was not bound to make the admissions asked for. If one party applies to the other to admit documents, all that he has a right to ask is that the due execution of the documents shall be admitted. If he asks at the same time for an admission of the authority by which they were written, the party called on to make the admission is not bound to do so. The party tendering the admission must take care that he does not ask too much. When the documents are examined, it appears clear that the application to admit was in an improper form, and the effect is the same as if there had been no application at all.

Rule refused (a).

(a) See *Wilkes v. Hopkins*, 1 C. B. 737.

1857.

## ELIZA THOMAS v. PACKER.

Jan. 28.

**EJECTMENT** to recover possession of a messuage with the appurtenances.—The defendant appeared and defended for the whole of the premises.

At the trial, before *Martin*, B., at the Middlesex sittings in last Michaelmas Term, it appeared that David Thomas by indenture (a) demised to the defendant the premises sought to be recovered, for a term of three years from the 25th March, 1852, at the yearly rent of 46*l*, payable quarterly.

The indenture contained a covenant by the defendant to pay rent, and there was a proviso for distress and re-entry by the lessor on non-payment of rent, or non-performance of the covenants. David Thomas died in December, 1853, having by his will bequeathed the premises in question to the plaintiff. The defendant entered under the lease, and at its expiration at Lady Day, 1855, continued to occupy the premises without any new agreement; and he paid rent to the plaintiff, at the same rate, up to Midsummer 1855. At the time the writ issued three quarters rent were due, and there was no sufficient distress on the premises.

It was submitted on the part of the defendant that the proviso for re-entry did not attach to the new tenancy created by the payment of rent after the expiration of the lease. The learned Judge was inclined to think that a condition of this kind could not be implied, and he directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for her.

A proviso in a lease for re-entry on non-payment of rent, is a condition which attaches to the yearly tenancy, created by the tenant holding over and paying rent after the expiration of the lease.

(a) The indenture was in the form prescribed by the 8 & 9 Vict. c. 124, intituled "An Act

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 THOMAS
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Hugh Hill, in the same term (Nov. 22), obtained a rule nisi, on the ground that a tenant holding over after the expiration of his term without having entered into a new contract, and paying rent at the same rate as that reserved by the lease, continues to hold upon the terms in the lease so far as they are applicable to a tenancy from year to year, including the provision as to re-entry.—He referred to *Doe d. Rigge v. Bell* (*a*), *Digby v. Atkinson* (*b*), *Richardson v. Gifford* (*c*), *Doe d. Thomson v. Amey* (*d*), *Buckworth v. Simpson* (*e*).

Joyce, now shewed cause.—Forfeiture of this kind is incompatible with a tenancy from year to year. The law is thus stated in Smith's Landlord and Tenant (*f*):—“ But though at the end of the lease, if the tenant holds over he holds over as a tenant at sufferance,—still, if when the period for payment of rent comes, he pay to his landlord the rent reserved by the expired lease, he becomes tenant from year to year; the payment of such rent by him, and the receipt of it by his landlord, being considered indicative of their mutual intention to create a yearly tenancy; and thereupon the Statute of Limitations ceases to run against the landlord, who acquires a new reversion expectant on the yearly tenancy, and the tenant becomes entitled to the ordinary notice to quit. And it is very remarkable that the yearly tenancy thus raised is governed, not by the simple rules which govern yearly tenancies in the absence of express stipulation, but by the provisions of the expired lease, so far as they are consistent and compatible with a yearly holding.” Certain covenants are applicable to a yearly holding, because they are not incon-

(*a*) 5 T. R. 471.

(*d*) 12 A. & E. 476.

(*b*) 4 Camp. 275.

(*e*) 1 C. M. & R. 834.

(*c*) 1 A. & E. 52.

(*f*) p. 219, Maude's ed.

sistent with the agreement between the parties to create a tenancy; but the law will not imply a term which would destroy the subject-matter of the agreement. [Pollock, C. B.—Why may it not be implied that if the tenant does not pay the rent he shall go out?] Every matter relating to the determination of the tenancy is provided for by the agreement to hold from year to year. [Watson, B.—Suppose the tenancy was determinable at Michaelmas, and the tenant paid no rent after Lady Day, it would be a year and a half before the landlord could get him out. It is not unreasonable to imply a condition that the landlord shall enter when the tenant ceases to pay rent.] Here the landlord has a remedy by distress. In the case of a lease, the tenant may well consent to a clause of forfeiture, since he gets an equivalent in the shape of a long term. [Pollock, C. B.—It is rather the reverse: a tenant would lose more by forfeiting a term of twenty years.] Moreover it is a question for the jury on the facts proved, whether the tenant holds upon any of the terms of the former lease: *Hyatt v. Griffiths* (a).

Hugh Hill and *Beasley* appeared in support of the rule, but were not called upon to argue.

Pollock, C. B.—The rule must be absolute. The law does not say, that if a person enters into possession of land and pays rent for it, he shall be liable to be turned out if he does not continue to pay—other remedies are provided for that state of things; but where the parties have made a bargain for a particular term, and after that has expired, the tenant holds over, the law implies that he continues to hold on such of the terms as are applicable to a tenancy from year to year. In *Digby v. Atkinson* (b), it was held that a

(a) 17 Q. B. 506.

(b) 4 Camp. 275.

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covenant to insure was applicable to a new yearly holding. *Doe d. Thomson v. Amey*(a) seems to me precisely in point. There it was held, that where a party is let into possession, and pays rent under an agreement for a future lease, which is to contain a covenant against taking successive crops of corn, and a condition of re-entry for breach of covenant, he thereby becomes a yearly tenant subject to that condition.

MARTIN, B.—If this case had rested solely on my own judgment I should have had considerable doubt about it, because, for the first time, we are going the length of introducing a condition into a tenancy of this kind which is a mere relation implied by law. I always thought that there was a distinction between conditions annexed to real estate and covenants ; and it is laid down by Lord Coke, that a condition which destroys an estate, is to be taken strictly(b). But I have spoken to some other Judges on the subject, and they think that this is a term which goes along with the continuing tenancy. I must confess, however, that if I alone had to decide the matter, I should pause before I held that such a condition attached to a tenancy created by implication of law.

WATSON, B.—I am of opinion that the rule ought to be absolute. It has been settled that where a tenant holds over, or under a void lease, or is let into possession under an agreement for a lease, he becomes tenant from year to year upon the terms of the lease so far as they are applicable. When he pays rent he has a year's possession ; whereas, if he were a tenant at will, he would be liable to be turned out at any moment. In *Doe d. Darenish v. Moffatt*(c) the defendant was in possession

(a) 12 A. & E. 476.

(b) Co. Lit. 219 b.

(c) 15 Q. B. 257.

under a demise which was void as a lease, but operated as an agreement for a lease for three years; and it was held that the payment of rent created a tenancy from year to year, which might have been determined during the term by a notice to quit; but that at the end of the three years the tenancy expired, so that no notice to quit was necessary. *Doe d. Thomson v. Amey*, which has been referred to, is also an authority in point. And, indeed, it seems most reasonable that it should be so, for (as I observed in the course of the argument) if a tenant pays the first half-year's rent, he might keep possession for a year and a half for nothing, except that he is subject to a distress, and that is not always available. Again, suppose a covenant not to carry on an offensive trade, or to use the house as a house of ill-fame, is the tenant not to be bound by those covenants because he has held over? It is important that no doubt should be thrown on the law relating to the liability of tenants in possession under an agreement for a lease, or a void or expired lease; and for this reason, that a great portion of the tenancies, both in London and in the country, are of that description. It certainly seems to me that a condition for re-entry on non-payment of rent, is peculiarly applicable to a tenancy from year to year.

Rule absolute (a).

(a) See *Tooker v. Smith*, post.

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BAKER v. CAVE.

By 7 & 8 Vict. c. 110, s. 15, if certain returns made are conformable to the provisions of the Act, it is the duty of the registrar of Joint Stock Companies to grant to a Company a certificate of complete registration, signed by him and sealed with his seal of office, which certificate is to set forth whether the Company has been constituted completely; and in the absence of evidence to the contrary any such certificate is to be received in evidence, without proof of the signature thereto or seal of office. By s. 25, on complete registration of any

Company being certified by the registrar of Joint Stock Companies, such Company shall be and is thereby incorporated. By s. 19, the Committee of Privy Council for Trade may appoint an assistant registrar, and such assistant registrar shall, in the absence of the registrar, be competent to do all things which the registrar is authorized to do; and the provisions in the Act, relating to the signature and seal of office of the registrar, are to apply to the assistant registrar. *Held*, that a certificate of the complete registration of a Joint Stock Company, signed and sealed by the assistant registrar, is admissible as evidence of the complete registration of a Company, though it does not appear either on the face of the document or by evidence aliunde, that the registrar was absent at the time it was so signed and sealed: *Dubitante, Watson, B.*

The certificate of the annual return of the name and business of a Joint Stock Company, signed and sealed by the registrar of Joint Stock Companies, pursuant to 7 & 8 Vict. c. 110, ss. 14, 10, is evidence that the Company was a completely registered Company at the time such return was made.

February, 1856, or whenever the current year of tenancy may expire.

As witness my hand this 14th day of July, 1855.

For Thomas Cave, Managing Director, A. A. Co.

Wm. Coates.

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On cross-examination the plaintiff stated that Mr. Cave was treated with as the managing director, and that he had no business except that of the office. A memorandum was made December 22nd, 1854, that the Company had taken the premises. The Company carried on at Leeds the business of effecting assurances both on life and against fire. The local board had a salary of 250*l.* a year. In order to shew that the defendant was not liable, but that the Company should have been sued, the defendant relied on the 25th section of the 7 & 8 Vict. c. 110. To prove the complete registration of the Company he put in the following certificates:—

No. 381. Certificate of complete registration of the Anchor Assurance Company, pursuant to the Act 7 & 8 Vict. c. 110.

I, George Taylor, Esquire, Assistant Registrar of Joint Stock Companies, do hereby certify that the Anchor Assurance Company is completely registered according to law.

Given under my hand, and sealed with my seal of office this first day of October, eighteen hundred and forty-nine.

(L. s.)

George Taylor,  
Assistant Registrar of Joint Stock  
Companies.

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Annual certificate for the year 1856, of the registered Anchor Assurance Company.

(L. s.)

Pursuant to the Act 7 & 8 Vict. c. 110, I, Francis Whit-

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marsh, Esquire, Registrar of Joint Stock Companies, do hereby certify that I have received, this year, the annual return of the name and business of the Anchor Assurance Company.

Given under my hand and seal of my office this 11th day of January, 1856.

Fr. Whitmarsh,

Registrar of Joint Stock Companies.

The defendant also put in receipts for rent from the Anchor Assurance Company, signed by the plaintiff. It was objected that the certificates were not evidence that the Anchor Assurance Company was a Company completely registered pursuant to the 7 & 8 Vict. c. 110. The jury, under the direction of the Deputy Sheriff, found a verdict for the defendant.

*R. Hall* had obtained a rule to shew cause why the verdict for the defendant should not be set aside and a new trial had, on the ground that the certificate of the assistant registrar was improperly admitted in evidence, neither purporting to have been granted by him in the absence of the registrar, nor being shewn to have been in fact so granted, against which

*Tindal Atkinson* now shewed cause.—The question is, with whom was the contract made. The Judge directed the jury that the Anchor Assurance Company being incorporated the defendant was not liable. The plaintiff dealt with them as a Joint Stock Company, and therefore cannot avail himself of the informality of the certificate of registration, which does not disclose the circumstances which led to its being signed by the assistant registrar instead of the registrar. The annual certificate under the 14th section purports to have been signed by the registrar.

*R. Hall*, in support of the rule.—The contract was with a Company. The defendant is liable, as a co-partner, with the other members, unless the Company is shewn to have been registered. By the 25th section of the 7 & 8 Vict. c. 110, on the complete registration of any Company being certified by the registrar of Joint Stock Companies, such Company is incorporated from the date of the certificate. By section 19, it is provided that “the assistant registrar shall, in the absence of the registrar, be competent to do all things which the registrar is authorized or empowered to do.” Here the certificate should have shewn on the face of it, or the defendant should have proved that the registrar was absent, in order to prove by the certificate that the Company was incorporated. These certificates form a new class of evidence, and it is important that every thing which is required to render the certificate available in proof, but which does not appear on the face of the certificate, should be proved. The 8 & 9 Vict. c. 113, s. 1, makes the documents to which it relates admissible, in evidence, only where they purport to be properly certified. In *Rex v. All Saints, Southampton* (*a*), the examination of a soldier taken before two magistrates, was tendered in evidence, under 22 Geo. 3, c. 4, to prove his settlement. By that Act the justices had only power to examine in the case of a soldier quartered in the place for which they were justices; and it did not appear by the examination itself, or by other proof, that the soldier at the time when he was examined, was quartered in the place where the justices had jurisdiction. *Bayley*, J., pointed out that it was necessary that these facts should be shewn aliunde, or by the examination itself; and the examination was held not to be admissible. In *Bosanquet v. Woodford* (*b*) the person before whom the return was sworn was proved to have been a

(*a*) 7 B. & C. 785.

(*b*) 5 Q. B. 310.

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justice of the peace. If there were any circumstances which gave the assistant registrar power to certify, they were peculiarly within the knowledge of the assistant registrar and the defendant. The second certificate was evidence of nothing but that a Company, calling itself the Anchor Assurance Company, made an annual return. [Watson, B.—The return was made under the 14th section, which provides that every registered Joint Stock Company shall annually make to the registry office a return of the name and business of the Company; and that on the receipt of such return, the registrar of Joint Stock Companies shall give a certificate thereof.]

POLLOCK, C. B.—I am of opinion that this rule must be discharged. I think that there was evidence that the Company was a Company completely registered under 7 & 8 Vict. c. 110. This may be proved in various ways, as against people who have dealt with it as such. In this case a certificate of complete registration, signed by the deputy registrar of Joint Stock Companies, was put in. His certificate was an act not judicial but purely ministerial. In *Rex v. All Saints, Southampton* (a), the taking of the examination was an act of a judicial nature: it had reference to the possibility of legal proceedings, and was taken for the purpose of being used in such proceedings. The Joint Stock Companies Act, which gives the deputy registrar a power of certifying, says, that he may do so in the absence of the registrar. It is admitted that if the certificate had contained a statement of the absence of the registrar it would have been sufficient. Judicial acts must contain in themselves the source of the power, but that rule does not apply to ministerial acts. I think that the absence of the registrar may be presumed, it being clearly contrary

(a) 7 B. & C. 785.

to the public duty of the assistant registrar to give a certificate except in the absence of the registrar. But it is not absolutely necessary to produce the certificate of complete registration to shew that a Company is completely registered. The 7 & 8 Vict. c. 110, s. 14, requires an annual return to be sent in by Companies completely registered, of the name and business of the Company; and on the receipt of such return, the registrar of Joint Stock Companies is to give a certificate thereof. That certificate, if not made evidence by the 7 & 8 Vict. c. 110, is rendered admissible by 8 & 9 Vict. c. 113, s. 1. It shews that an annual return was sent in, and that the registrar of Joint Stock Companies certified that the Company was then dealing and acting as a completely registered Company. But if this had not been so,—if the Company was not liable to be sued as a quasi corporation, the plaintiff must have failed, because one co-adventurer cannot sue another. Therefore, in any view of the case, the verdict was right.

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MARTIN, B.—I am of the same opinion. The question is, whether the documents were admissible in evidence. By the 7 & 8 Vict. c. 110, a registrar is appointed who, upon the registration of certain particulars required, is to grant certificates of complete registration. By the 15th section, in the absence of evidence to the contrary, any such certificate shall be received in evidence without proof of the signature thereto, or of the seal of office affixed thereto. If the Act had stopped there, the registrar alone could certify. But by the 19th section, the Committee of Privy Council for Trade may appoint an assistant registrar who, in the absence of the registrar, is competent to do all things which the registrar is empowered to do; and the provisions in the Act, relating to the signature and seal of office of the registrar, are to apply to the assistant registrar. Therefore the

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assistant registrar is a public officer who, under certain circumstances, is authorized to seal these certificates. The objection is, that it is not proved that the registrar was absent. If he was not so in fact, the matter could not be helped by the assistant registrar signing the certificate. But this is a document signed by a public officer, and it must be presumed to have been done rightly. \*As to the other points I agree with the Lord Chief Baron.

WATSON, B.—I have felt considerable doubt whether the certificate of complete registration was receivable in evidence. But on the other points I entirely agree with the rest of the Court. The certificate of the annual return shews that the Company was a completely registered Company making an annual return to the registrar of Joint Stock Companies. If the plaintiff contends that, consistently with this, the Company may have been incorporated after the contract was entered into, the answer is, that if the Company was not incorporated at the time of the contract, the plaintiff had no right at all to sue the defendant, as in that case the plaintiff and defendant must have been in the position of partners.

Rule discharged.

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DANIELL v. THE OFFICIAL MANAGER OF THE ROYAL  
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Jan. 31.

*LUSH* had obtained a rule calling on one Beattie to shew cause why execution should not issue against him, as one of the shareholders in the Royal British Bank, for the balance of a debt for which judgment had been recovered in the above action.

The affidavits in support of the application stated, in substance, that the Royal British Bank was a joint stock bank incorporated under the provisions of the 7 & 8 Vict. c. 113, and that the liability of the shareholders was not restricted: that an order absolute had been made by the Court of Chancery for winding up the affairs of the bank and an official manager appointed: that a petition in bankruptcy had been filed, and the bank adjudicated bankrupt, pursuant to the 7 & 8 Vict. c. 111: that the plaintiff had brought an action against the official manager and obtained judgment: that a f. fa. issued thereon, which was returned nulla bona: that the bank had no property or effects whatever upon which execution could be levied.—It was also stated that notice of the application had been given to Beattie, and that his name appeared in the memorial of shareholders, a verified copy of which was annexed (a).

The affidavit of Beattie, in answer, stated that in September, 1849, the bank was established under a charter from the Crown, with a capital of 100,000*L*, of which 50,000*L* had been paid up when they commenced business: that in February, 1854, a balance sheet of the affairs of the bank

To an application for execution against a shareholder of a joint stock bank under the 7 & 8 Vict. c. 113, s. 10, it is no answer that he was induced by the fraud of the directors to purchase the shares, and that, as soon as he discovered the fraud, and before the application, he repudiated the shares.

The provisions of the 7 & 8 Vict. c. 113, ss. 16, 17, as to the memorial of shareholders, are merely directory, and therefore a person whose name is on the memorial is liable as a shareholder notwithstanding the memorial is not in the form prescribed by that Act.

(a) In the heading of this memorial (the form of which is given in Schedule (A.) (B.) of the

7 & 8 Vict. c. 113), instead of the title of that Act, the title of the 9 Geo. 4, c. 46, was inserted.

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was issued by the directors, in which the balance of assets, above the liabilities, was stated to amount to 35,374*l.*, and a dividend of 6*l.* per cent. was declared: that in August, 1854, another balance sheet was issued, in which the balance of assets, above the liabilities, was stated to be 38,371*l.* 13*s.* 2*d.*, and another dividend of 6*l.* per cent. was declared: that in March, 1855, the deponent received from the bank a circular in which the directors stated that they had obtained from the Crown a supplementary charter authorizing them to increase the capital of the bank by 500,000*l.*, which they intended to do: that 100,000*l.* was already subscribed and that the shares were 100*l.* each, of which 50*l.* was to be paid before certificates were issued: that deponent, upon the faith of the statements contained in the balance sheets, and believing from the circular that the bank was authorized to issue new shares, on the 27th of March, 1855, signed a deed purporting to be a supplemental deed of settlement, and received certificates purporting to be certificates for ten new shares in the bank: that the bank stopped payment on the 3rd of September, 1856, when deponent for the first time ascertained that the balance sheets were utterly false and fraudulent, and were published in furtherance of a scheme concocted by the directors and manager of the bank for fraudulently obtaining a more extended credit, and for procuring money to be paid in the way of additional capital: that at the time deponent was induced to take shares, the bank had lost the whole of the paid up capital and a considerable sum in addition; and so far from ever having had a reserved fund, as stated in the balance sheets, was in a state of hopeless insolvency: that the preliminaries required by the statute, under which the supplemental charter professed to be granted, had not been complied with: that if the deponent had been acquainted with the facts before he signed the document, he would not have signed it; and since he has

become acquainted with the facts he has repudiated the purchase of the alleged new shares, and has made a claim in the Court of Bankruptcy for the money paid for such shares.

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*Mellish* shewed cause (Jan. 29).—By the 7 & 8 Vict. c. 113, s. 10, a plaintiff must first issue execution against the property and effects of the Company, and if such execution shall be ineffectual, then against the person, property, and effects of any shareholder, or in default of obtaining satisfaction from any shareholder, against the person, property, and effects of any person who was a shareholder at the time when the cause of action arose: “Provided always, that no person having ceased to be a shareholder of the Company shall be liable for the payment of any debt for which any such judgment, &c., shall have been obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same,” &c. Here the party sought to be charged is not a shareholder for the time being. He was induced by the fraud of the directors to purchase shares and sign the deed of settlement, and immediately he discovered the fraud he repudiated the shares. It is not denied that he is liable as a former shareholder for debts contracted between the time of his execution of the deed of settlement and his repudiation of the shares; but he cannot be charged as a shareholder for the time being, inasmuch as he ceased to be a shareholder before this application was made. Suppose the directors of a Company falsely represented that the liability of the shareholders was limited, whereby a person was induced to purchase shares, is he to be subject to an unlimited liability notwithstanding he repudiated the shares immediately he discovered the fraud? The proviso in the 10th section of

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the 7 & 8 Vict. c. 113, shews that the intention of the legislature was to assimilate, as far as possible, the liability of the shareholders to that of partners at common law. In the case of an ordinary partnership, if a person was induced by fraud to become a partner, he would be liable for the partnership debts so long as he continued a member of the firm; but if, when he discovered the fraud, he repudiated the partnership, his liability would cease. In *ex parte Ginger*, In re *Tipperary Joint Stock Banking Company* (*a*), where the directors of a banking Company had issued unappropriated shares, in violation of the partnership deed in a matter of substance, it was held that the issue was null and void, and that a purchaser of the shares, who had received a dividend, was not a proprietor, and ought not to be placed on the list of *contributors*. It will be argued that Beattie is liable as a shareholder for the time being, because his name appears in the memorial of shareholders; but the memorial is not in the form prescribed by the Act: ss. 16, 17, Schedule (A.) (B.). [*Martin*, B.—Are the creditors of the bank to lose their money because the directors deliver an incorrect memorial?] The 21st section says, that the persons whose names shall appear in the memorial "shall be liable to all legal proceedings;" it is more stringent than the 6th section of the 7 Geo. 4, c. 46, which makes the memorial only *prima facie* evidence. The requisites of the statute ought therefore to be strictly complied with.

Lush appeared in support of the rule, but was not called upon to argue.

It having been mentioned that a similar question was pending in the Court of Queen's Bench, the Court said

(*a*) 5 Irish Chan. & Com. Law Rep. Ch. 174.

that they would reserve their judgment until after judgment had been pronounced in the Court of Queen's Bench.

Cur. adv. vult.

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POLLOCK, C. B., now said.—In the case of *Daniell v. The Royal British Bank* the rule must be absolute, and for the reasons stated by the Court of Queen's Bench in a similar case of *Henderson v. The Royal British Bank (a)*.

Rule absolute.

(a) The reporters have been favoured by Messrs. Ellis & Blackburn with the following judgment in that case:—

Lord CAMPBELL, C. J., (Jan. 30) said.—This was an application for leave to take out execution against a shareholder, and the proposed answer to the application was, that the shareholder had been induced by fraud to take the shares. He had remained a shareholder for some time, and received dividends and acted in all respects as a shareholder until the Royal British Bank stopped payment, and until its bankruptcy; and he then gave notice that he was no longer a shareholder, and, as far as he could, disaffirmed the contract under which he became a shareholder as being induced by the fraud of the directors. He demanded back all the monies he had paid, and being a depositor himself, he demanded the deposit and all the advances. The question is, whether if it were established that this fraud had been practised upon him, it could be an answer to this application. If there was any doubt about it we should not make this rule absolute, but we should direct a scire facias to issue so that the question might be raised on the record. We entertained no doubt on the argument, but being informed that similar applications had been made to the Courts of Common Pleas and Exchequer, and that rules were depending in those Courts, we thought that upon a matter of this sort it would be well if we had a conference with the other Judges before our judgment was given. That conference has taken place and all the Judges were unanimously of opinion that this can be no answer to the application, either upon principle or authority. This is an application by a creditor, who upon the faith that the party who then was shareholder, and who held himself out to the world as a shareholder, was one, gave credit to the bank and has obtained judgment against the bank. There were no assets of the bank as a Company, and the

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application now is that execution may issue against that party individually. It would be monstrous to say that he, having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder. It would be monstrous injustice and contrary to all principle. Whether he could say that with regard to other shareholders not privy to the fraud, we need not say. There may be some difficulty about that. But that is not the question we have to determine, which is simply whether this is an answer to a creditor who has given trust upon the faith of his being a shareholder. Suppose this were a common partnership, and that there was credit given to the firm, would it be any answer to an action by the creditor against one of the partners that the defendant was fraudulently induced by the other partners to become a partner. *Inter se*, that might be considered, but as between the firm and a creditor it is a matter wholly immaterial. Now the party here admits that he is a shareholder and acted as such until the bank stopped payment. His name was placed on the register and remains on the register. There is some irregularity in that register, but we are of opinion that all that is said in the statutes as to the manner in which the register shall be intituled and made up, is only directory and not conditional, that he was bound at all events *prima facie* by his name appearing on the register, notwithstanding those errors. The rule must therefore be absolute.

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Jan. 28.

**THE GUARDIANS OF THE POOR OF THE WYCOMBE UNION
v. THE GUARDIANS OF THE POOR OF THE ETON UNION.**

THIS action was brought to recover certain monies alleged by the plaintiffs to have been paid for the defendants at their request, in respect of relief given by the plaintiffs to certain paupers resident within their Union from Midsummer 1845 to Lady Day 1854, both inclusive; which said paupers, during all the time aforesaid, belonged to and were removable to parishes in the Eton Union. By agreement of the parties and order of a Judge, according to "The Common Law Procedure Act, 1854," the following case was stated for the opinion of the Court, without pleadings:—

The Wycombe Union and the Eton Union, which were and are respectively formed under the provisions of the 4 & 5 Wm. 4, c. 76, existed prior to the year 1845 and thence to the present time; and there have been during all that time a Board of Guardians of the Poor of the Wycombe Union and a Board of Guardians of the Poor of the Eton

Between Mid-
summer 1845
and Lady Day
1854, the
guardians of
the Wycombe
Union made
payments by
way of relief
to certain non-
settled paupers
of the Eton
Union. The
only authority
for these pay-
ments were
letters written
in the years
1847, 1849,
and 1850, in
which the
guardians of
the Eton Union
requested the
guardians of
the Wycombe
Union to make
weekly pay-
ments to cer-
tain paupers.
One of these

"if they would
furnish an account at the end of each quarter they would be repaid." Article 60 of the Consolidated General Orders of the Poor Law Board, requires that all account of relief to non-settled paupers shall be sent in within fourteen days from the close of each quarter. In July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account in which they claimed a balance (after giving credit for a payment made in November 1849,) for relief of non-settled paupers of the Eton Union, from Lady Day 1845 to Lady Day 1847, and from Lady Day 1849 to Lady Day 1850. No previous account had been sent in or claim made in respect thereof. From Lady Day 1850 to Lady Day 1854, the accounts were made out sometimes quarterly and sometimes half-yearly, but in no case were they sent to the Eton Union within fourteen days after the expiration of each quarter or half-year, but at periods varying from one to three months after such time.—*Held*, that the plaintiffs could not recover any part of the claim, for assuming that an action would lie, this was a qualified contract to pay if the accounts were sent in within fourteen days after each quarter, as required by the order of the Poor Law Board.

Also that the payment not being generally on account did not take the case out of the Statute of Limitations.

Sensible, that no action will lie by one Board of Guardians against another for monies paid for the relief of their non-settled poor.

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Union respectively elected from time to time, and constituted under and according to the provisions of the 4 & 5 Wm. 4, c. 76. The defendants were elected guardians of the poor of the Eton Union for the current year in April 1854.

During the period from Midsummer 1845 to Lady Day 1854, the guardians of the poor of the Wycombe Union have, through their relieving officer for the time being, from time to time made sundry payments by way of relief to certain paupers resident within the limits of the Wycombe Union, but legally settled in and belonging, and by the guardians of the Wycombe Union removable to the Eton Union, the said paupers being respectively during all the said period non-resident poor of the Eton Union and non-settled poor of the Wycombe Union, within the meaning of articles 230 and 231 of the Consolidated General Order of the Poor Law Commissioners, subject to the facts stated in, and the question intended to be raised by the present case.

The only authority for such payments, or any of them, was given in and by letters addressed to the plaintiffs by the persons by whom the same purport to be written, and who wrote such letters as the officers of and under the directions (not under seal) of the Board of Guardians for the time being of the Eton Union, which letters are as follows:—

Burnham, Maidenhead,
 Sir, August 12th, 1847.

The Board of Guardians of the Eton Union have directed Mr. Williamson to inform you (but who is too ill to do so) that they will repay the relief advanced by the Wycombe Union to Holley and May.

I am, &c., for Thomas Williamson,

MARY ANN WILLIAMSON.

Mr. Kingston.

Burnham, Maidenhead.

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Sir,

April 4th, 1849.

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I am directed by the Board of Guardians of the Eton Union to inform you that they have allowed 2s. weekly to each of the Druces, and that they will repay the advance to that amount. I have paid the brother 4s., the first week's relief, so that at Midsummer 48s. will be due to you,

Yours, &c.,

Mr. Kingston.

T. WILLIAMSON, R. O.

Board Room, Slough,

Sir,

March 26th, 1850.

I am directed by the Board of Guardians of the Eton Union to request you to pay Hannah Smith, a pauper chargeable to the parish of Langley Marsh, the sum of 2s. 6d. weekly, and which will be repaid to your Union quarterly by Mr. Barrett, our clerk. The said pauper is to reside with her daughter at Edsor.

Yours, &c.,

JOSEPH S. PULLEN,

Mr. Kingston, R. O.

Relieving Officer.

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Weekly relief ordered 26th day of March, 1850.

| Name. | Money. | Loaves
1 lb each. | For what
period. |
|---|--------------------------------|----------------------|---------------------|
| Hannah Smith,
Aged 68,
Parish, Langley Marsh. | s. d.
2 6
other articles | 1 lb | |

JOSEPH S. PULLEN.

Signature of relieving-officer.

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Eton, Bucks, March 15th, 1853.

Non-resident paupers.

Dear Sir,

I again brought this subject before our Board to-day, and they have desired me to inform you that if your Union will advance to

| | s. d. |
|--------------------------|---------------|
| Tabitha Druce of Burnham | - 2 0 weekly |
| Elizabeth May | - - - 2 6 do. |
| Hannah Holley | - - - 2 6 do. |
| Hannah Smith | - - - 2 6 do. |

during the present quarter from this date, and furnish an account thereof at the end of the quarter, they will repay you; and if it should appear from your report that a continuance of the relief be then necessary they will renew the authority for another quarter.

Yours, &c.,

J. Harman, Esq.,
Clerk of the Wycombe Union.

C. P. BARRETT.

Weekly payments in money were made by the Wycombe Union to the paupers mentioned in the above letters, and they claimed from the Eton Union 108*l.* 1*s.* 11*d.*, for monies so paid from Lady Day 1850 to Lady Day 1854.

On the 10th July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account in which the former claimed a balance of 97*l.* 15*s.* 0*½d.* (after giving credit for 3*l.* 11*s.* 6*d.*), for monies paid to non-settled paupers of the Eton Union from Lady Day 1845 to Lady Day 1847, and from Lady Day 1849 to Lady Day 1850. No previous account had been sent, or any claim made in respect thereof. From Lady Day 1850 to Lady Day 1854, the accounts were made out sometimes quarterly and sometimes half-yearly, and in no case were they sent to the Eton Union within fourteen days after the expiration

of each quarter or half-year, but at periods varying from one to three months after such time. No objection was made to such of the accounts as were made out half-yearly, on the ground that they included the amount of relief administered during the two preceding quarters, instead of being limited to the amount of relief administered during the immediately preceding quarter.

On the 21st December, 1844, the Poor Law Board issued a general order relating to the relief of non-resident and non-settled poor; the 7th and 8th articles of which order are as follows:—

Article 7.—“The clerk to every Board of Guardians shall at the first meeting of the guardians in each quarter, lay before the guardians, or their committee, the non-resident poor accounts posted in the ledger to the end of the preceding quarter, and shall take the directions of the guardians respecting the transmission of accounts due from other Unions and requests for payment.”

Article 8.—“The clerk shall, within fourteen days from the close of each quarter, transmit by post all accounts for relief administered in the course of the preceding quarter to non-settled poor to the guardians of the Unions on account of which such relief was given, and every account so transmitted shall state the names and class of the several paupers to whom the relief in question has been administered; and all accounts for relief duly administered to non-resident poor shall be discharged before the end of one calendar month from the receipt of such accounts.”

On the 13th January, 1846, the Guardians of the Poor of the Eton Union made and passed a resolution in the following terms:—

“Resolved, with a view to the more regular keeping of the non-resident and non-settled poor accounts, that this Board will not repay any relief which may be afforded by

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other unions or parishes to paupers settled within this Union after the 28th March next under any existing undertaking. That this Board will nevertheless consider and decide upon any applications which other unions or parishes may from time to time be pleased to make with reference to such paupers; but will in no case extend the authority to relieve beyond the last Saturday of the current quarter in which the application may be received."

A minute of this resolution was entered on the proceedings of the Board, and a copy sent by post to the clerk of the guardians of the Wycombe Union on the 17th January, 1846. The plaintiffs alleged that no copy of such minute was ever received, and that the said minute was never brought to their knowledge until after the 15th December, 1850.

On the 24th November, 1849, the guardians of the Eton Union paid to the guardians of the Wycombe Union, the sum of 3*l.* 11*s.* 6*d.* in respect of certain relief before then given by the last mentioned guardians to certain paupers resident within the Wycombe Union, but removable to the Eton Union.

On the 24th July, 1847, the Poor Law Commissioners, by their Consolidated General Order, rescinded the order of the 21st December, 1844, as to non-resident and non-settled poor, and ordered by article 80 as follows:—

"That every account for relief duly administered to non-resident poor, shall be discharged by the guardians within two calendar months from the receipt of such account, by the transmission of the amount due in one of the modes prescribed in article 79." And by No. 8 and 9 of the duties of the clerk in article 202 of the said order: they ordered "That the duties of the clerk shall be at the first meeting of the guardians in each quarter to lay before the guardians, or some committee appointed by them, the non settled poor

account and the non-resident poor account posted in his ledger to the end of the preceding quarter; and to take the directions of the guardians respecting the remittance of cheques or post-office orders to the guardians of any other union or parish, or the transmissions of accounts due from other unions or parishes and requests for payment; and within fourteen days from the close of each quarter to transmit by post all accounts of relief, administered in the course of the preceding quarter to non-settled poor, to the guardians of the unions and parishes on account of which such relief was given," &c. (a).

The Court are to be at liberty to draw all such inferences of fact as a jury might have drawn. The defendants claim, and are to have, if entitled thereto, the benefit of the

(a) The case also referred to the following articles:—Article 230 of the said order provides, that the term "non-resident poor" in that order shall be taken to mean all paupers in receipt of relief allowed on account of any Union in relation to which the term is used, but not residing therein. And by article 231, the term "non-settled poor" shall be taken to mean all paupers residing in the Union in relation to which the same is used, but to whom relief is allowed on account of some parish or union other than that in which they reside.

By article 81 of the said order, the clerk shall four weeks at least before March 26 and September 29 respectively in each year, refer to and ascertain the cost to each parish in the Union for the maintenance of the poor

and other separate charges, as well as for the common charges incurred in the half of the last year corresponding to the half-year next coming, and shall estimate and as near as may be divide amongst the parishes any extraordinary charges to which the Union may be liable in the coming half-year; and he shall also estimate the probable balance due to or from the parish at the end of the current half-year, and shall then prepare the orders on the several parishes for the sums, which upon such computation, it shall appear necessary for them to contribute to the expenses of the Union for the coming half-year; and the orders so prepared shall be laid before the guardians for their consideration three weeks at least before the expiration of the current half-year.

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Statute of Limitations, with regard to all items from Lady Day 1845 to Lady Day 1847.

The question for the opinion of the Court is, whether the defendants are liable to pay to the plaintiffs any, and if so, what part or parts of the plaintiffs' claim.

Wells, Serjt. (*Hugh Hill* with him), for the plaintiffs.—The defendants, as guardians of the Eton Union, are liable to pay to the plaintiffs, as guardians of the Wycombe Union, the entire amount expended by that Union in the relief of the non-resident poor of the Eton Union. It will be contended on the other side that no action will lie for the recovery of this money; and that even if it would the plaintiffs cannot avail themselves of that remedy, since they have failed to transmit their accounts to the defendants within the time prescribed by the orders of the Poor Law Board. [*Martin*, B.—Is there any legal obligation on the guardians of a union to pay money for the relief of non-settled poor who might be removed and made directly chargeable?] It is the duty of the guardians to relieve all destitute persons within the union; that duty was formerly imposed on the overseers. Here there is evidence of a contract by the guardians of the Eton Union to repay the guardians of the Wycombe Union all monies expended by them in the relief of the non-resident poor of the Eton Union. The 4 & 5 Wm. 4, c. 76, s. 49, enacts, “That any contract which shall be entered into by or on behalf of any parish or union, for or relating to the maintenance, clothing, lodging, employment, or relief of the poor, or for any other purpose relating to or connected with the general management of the poor, which shall not be made and entered into in conformity with the rules, orders, and regulations of the said commissioners on that behalf, or

otherwise sanctioned by them shall be voidable, and if the commissioners shall so direct shall be null and void." Therefore, assuming that a contract of this kind was not sanctioned by the poor law commissioners, the only effect would be that they might declare it void. But the commissioners, by their orders, made in pursuance of the 15th section of the 4 & 5 Wm 4, c. 76 (*a*), recognize such contracts. Article 87 of the Consolidated General Orders, requires "that every account for relief duly administered to non-resident poor, shall be discharged by the guardians within two calendar months from the receipt of such account." The letters, referred to in the case, afford ample evidence of a contract (*b*), and the plaintiffs are not prevented from recovering by reason of the neglect of their officer to send the accounts to the guardians of the Eton Union within the time prescribed by the orders of the poor law commissioners.—(He then referred to articles 7 and 8 of the General Orders of the 21st December, 1844 (*c*), and articles 80 of the Consolidated General Orders of the 24th July, 1847) (*d*).—These orders have not the effect of an act of parliament, but are merely directory. Their object is to inform the clerk of the guardians of the duties of his office, and his neglect to perform those duties cannot affect the rights of third parties. Delay in transmitting the accounts might be caused by unavoidable circumstances, such as the illness or death of the clerk.—Then with respect to the Statute of Limitations, the payment made on the 24th November, 1849, is sufficient to take the case out of its operation.

Lush, for the defendants.—There is no statute or order

- (*a*) Lumley's Consol. Orders, contract not being under seal.
- 153. (c) *Ante*, p. 691.
- (*b*) The defendant's counsel (d) *Ante*, p. 692.
waived all objection as to the

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of the poor law commissioners which justifies this action. The guardians represent the associated parishes composing the union; they are elected annually; they relieve all poor persons within the union, but they debit each particular parish every half-year, with the charges for relief afforded to its paupers. They have no funds of their own, and it is their duty to administer the funds entrusted to them strictly, according to the statutes and orders of the poor law commissioners. They have no authority to contract debts or pledge the credit of their successors except when specially authorized by the poor law commissioners; and if they should do so they would be personally liable. Such being their powers and duties, the effect of the statutes and orders is to enable them to contract with the guardians of another Union, for the relief of the non-resident paupers of that Union, and they are entitled to be repaid the money advanced, provided they transmit their account to such Union within fourteen days after the expiration of each quarter; but if they neglect to do so, they are precluded from recovering anything. The 26th section of the 4 & 5 Wm. 4, c. 76, empowers the poor law commissioners to unite several parishes so as to form a Union, and the workhouses of such parish are to be for their common use; but, notwithstanding, each parish is to be "separately chargeable with and liable to defray the expense of its own poor whether relieved in or out of any such workhouse." The 15th section relates to the authority of the commissioners to make orders. The 38th section provides for the election of a board of guardians, who are to administer relief to the poor in the Union. By section 49, contracts for the maintenance or relief of the poor, not in conformity with the orders of the commissioners, may be declared void. By section 54, the relief of the poor is to belong exclusively to the guardians or a select vestry.

Assuming that the guardians of the Wycombe Union were authorized by the guardians of the Eton Union to relieve their non-resident poor, the former should have sent in their accounts within the time prescribed by the orders of the poor law commissioners; and if not paid, they should have applied to the commissioners to enforce payment. This was a qualified contract, that is to say, provided the accounts were sent within the prescribed time. Articles 7 and 8 of the Orders of the 21st December, 1844, were merely directory as to the duties of the clerk of the guardians; and those orders have been superseded by the Consolidated General Orders of the 24th July, 1847. Article 80 of those orders requires that every account for relief to non-resident poor shall be discharged within two months from the receipt of it; and that the account shall be transmitted within fourteen days after the close of each quarter.—(He also referred to the 84th section of the 4 & 5 Wm. 4, c. 76.)—Then as to the Statute of Limitations—the payment made in 1849 was not a payment generally on account, but a payment in respect of a specific claim; and therefore it cannot operate to bar the statute.

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Wells, Serjt., replied.

POLLOCK, C. B.—I am of opinion that the guardians of the Wycombe Union have not made out any claim against the guardians of the Eton Union which can be enforced by an action at law. I doubt whether the guardians had power to enter into such a contract as this. It is not a contract within the 49th section of the 4 & 5 Wm. 4, c. 76. That enactment relates to contracts made by any parish or union for the maintenance, clothing, lodging, employment, or relief of their poor; and such contracts must be in conformity with the rules, orders, and regula-

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tions of the commissioners, otherwise they have power to declare them void. That has no reference to a contract between two boards of guardians with respect to furnishing relief to non-resident poor. Such a matter is entirely under the control of the Poor Law Board, and their sanction ought first to be obtained, for it is a question for them to decide whether such a contract shall be entered into. This being put on the ground of a legal claim, we must dispose of it as we would any other question of legal liability; and I am of opinion that no claim has been made out, and that upon the facts stated there is no evidence of any liability on the part of the defendants. The Statute of Limitations applies to a large part of the demand, and the payment which has been made does not take the case out of the statute; for it was made in respect of particular and specific transactions, and therefore this is not like the case of a merchant's or tradesman's accounts where the payment is made in respect of the entire demand. Then as to the items within six years,—all the documents are coupled with a very reasonable condition which has not been complied with. Our judgment will therefore be for the defendants.

MARTIN, B.—I am of the same opinion. It is not shewn that there is due from the guardians of the Eton Union to the guardians of the Wycombe Union any debt recoverable in a Court of law. The guardians of a Union are a corporation created by act of parliament, but they are a corporation of a peculiar character. They have no property of their own; though for some purposes the workhouse may be their property—yet strictly speaking they have no property; but it is their duty to administer the funds supplied by others, as directed by the statutes and orders of the poor law commissioners. The intention of the leg-

lature was, that they should supply the poor of the parishes within the Union with necessaries, and charge to each parish the sums properly payable in respect of the poor of that parish, so that the persons who were legally chargeable should bear the burthen. Such being the general intention of the legislature, I asked my brother *Wells*, in the course of the argument, if there was any legal obligation on the guardians of the Wycombe Union to pay money for the relief of the poor of the Eton Union, who might have been removed and made directly chargeable. He answered, that it was the duty of the guardians to relieve all destitute persons within the Union. No doubt, it may be reasonable that the guardians of one Union should pay money for the relief of the paupers of another Union, and be entitled to recover it from the guardians of the latter; but the question here is, whether there is any legal obligation on them to afford such relief—if there were, that would be one step in the plaintiffs' favour. I am not satisfied that there is any such obligation, and consequently the plaintiffs must shew some authority from the defendants to make these payments, for they are in no better condition than any ordinary individual. If a person voluntarily pays money for another, he cannot sue the latter for it; in order to render him liable it must be shewn that there was a previous authority or an adoption of the payment. So here, in the absence of a legal obligation, the plaintiffs must shew an authority from the defendants to make these payments for them. Now the only authority is the letters set out in the case, and as we are sitting here as a jury to put the proper construction upon them, we must look at them as a jury would—not merely construing them by the terms contained in them and nothing else, as a Judge must do in putting a construction on written documents; but if they have reference to something else,

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we must look also to that, in order to ascertain their real meaning. These letters refer to the relief of non-resident paupers, we must therefore look to the orders of the Poor Law Board in that respect. The 7th & 8th articles of the order of the 21st December, 1844, required the clerk, at the first meeting of the guardians in each quarter, to lay before them the non-resident poor accounts to the end of the preceding quarter; and within fourteen days from the close of each quarter to transmit all accounts for relief administered in the course of the preceding quarter to non-settled poor, to the guardians of the Unions, on account of which such relief was given. The 80th article of the Consolidated General Order of the 24th July, 1847, requires that every account for relief to non-resident poor shall be discharged by the guardians within two calendar months from the receipt of such account; and it also requires that such accounts shall be transmitted within fourteen days from the close of each quarter. Nothing can be more reasonable, for, if complied with, its effect is to cast the burthen of relieving the poor of each particular parish upon the persons by whom it ought to be borne, that is, those who were rateable inhabitants at the time the relief was granted. But if no account is sent until several years afterwards, persons may be charged in respect of such relief who are not the persons liable to pay for it. Then, treating the letters as if they were documents under seal and binding upon the defendants, in my opinion the writers meant to comply with the law, and the liability which they intended to incur was a qualified liability. In the letter of the 4th April, 1849, the writer says, "at Midsummer 48s. will be due to you;" and reading that letter, in connection with the orders, it means, "make up your quarterly account and transmit it to me and I will pay you." It is different from the case of an ordinary debt, because the guardians have only a limited

power to contract debts. In the letter of the 26th March, 1850, there is a request to pay to a pauper 2s. 6d. weekly, and which, says the writer, "will be repaid to your Union quarterly," clearly shewing an intention not to be liable unless the account was sent in quarterly. Again, in the letter of the 15th March, 1853, the writer says, "If your Union will advance certain sums to certain paupers, during the present quarter from this date, and furnish an account thereof at the end of the quarter, they will repay you." No account having been furnished by the Wycombe Union within the requisite time, they must bear the loss. If they had taken the proper steps to entitle themselves to be repaid, the defendants would have been in a position to obtain the money from the inhabitants liable to be rated in respect of it. Persons acting under limited powers and specified duties must comply with the exact letter of the law, in order to cast a liability on others. There being no legal liability to pay any part of this money, our judgment must be for the defendants.

WATSON, B.—I agree that there ought to be judgment for the defendants. I have great difficulty in seeing any ground upon which this action can be supported; and I certainly never before heard of an action against a board of guardians for relief given to non-resident poor. Look at the effect of allowing such an action;—the claim might be postponed until nearly six years after the relief was given, and supposing the plaintiffs recovered, against whom is the remedy? Must they apply to the Court of Queen's Bench for a mandamus to compel the defendants to make a rate? Some payments are general, as for the repair of the workhouse or the salaries of officers; but with respect to relief, each parish must support its own poor; so, if we were to hold that the plaintiffs could recover, the result

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would be, that for a bygone debt of 1850 the guardians would have to make, in 1856, a rate on each particular parish for its share of the expenses. The injustice of such a proceeding has been already pointed out. I am strengthened in that view by comparing this Act with The Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), the 121st section of which expressly provides, that if guardians shall for twenty-one days neglect or refuse to pay money ordered to be paid under that Act, the same may be recovered by action at law. But assuming that an action is maintainable, I agree with my brother *Martin*, and that this is a qualified contract, and that the defendants only undertook to pay provided the accounts were sent in within fourteen days after the end of each quarter.

Judgment for the defendants (*a*).

(*a*) The liability of guardians of a Union for the relief of the poor within it, is that which attached to the overseers previous to the passing of the 4 & 5 Wm. 4, c. 76. The case of *Clypton St. Mary's v. Raristock*, in Devon, in Sett. & Rem. Cases, p. 31, has been usually cited to establish the liability of the overseers in respect of all poor persons being in their parish. The report is as follows:—"The order recites: Whereas, John Saunderson and his wife are last settled in Clypton: These are to order you the churchwardens of Clypton, to repair to the parish of Ravistock and to relieve them, being so sick that they cannot be removed. *Curia*, The justices have no authority to send for officers out of another parish, but are bound to maintain the poor as

long as they continue with them. And per *Powell*, not parishioners to be relieved till they are carried to the parish. Quashed." There is an obscurity as to the meaning of this observation of Justice *Powell*, and probably there is some misprint. But *Bott*, in his Collection of Decisions upon the Poor Laws, pl. 524, has made the Justice utter these harsh words. And by *Powell*, J., "Parishioners are not to be relieved till they are carried to the parish." While *Nolan*, P. L., vol. 2, c. 34, s. 1, referring to this case, says: "Parishioners are not to be relieved until they are carried to their parish, which is bound to maintain them only so long as they continue there." It is however very doubtful what was meant by the learned author in this passage. In *Burn's Justice Poor* (p. 91, 29th ed.), it is laid

down, "By the several statutes, the poor were to resort or be sent to their own parishes to be relieved," and this case of *Clypton v. Ravistock* is cited as the authority; but the judgment of the Court is thus expressed,—"The parish where the poor reside are bound to maintain them as long as they continue with them." The remark of Powell, J., is omitted. It is of course well known that the poor were to be removed to

the parishes of their settlement to be ultimately relieved; but no statute will be found which requires them to resort there for their relief, or that prevents them from being relieved until sent thither. The statute 9 Geo. 1, c. 7, which regulates the order of justices for relief to poor persons, speaks of them as ordering "relief to any poor person dwelling in any parish" not settled or belonging to such parish.

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LUSH had obtained a rule to shew cause why the return to a writ of certiorari should not be taken off the file.—A summons had been issued out of the County Court of Staffordshire for an assault, committed by the defendant in the alleged execution of his office as a justice of the peace, in which the plaintiff claimed 50*l.* damages. Within six days after the service of the summons, the defendant's attorney served on the plaintiff's attorney a written notice, under 11 & 12 Vict. c. 44, s. 10, of the objection of the defendant to be sued in the County Court, dated the 4th day of June, 1856. On the same day the plaintiff's attorney gave notice that he abandoned the County Court proceedings, and on the 7th of June served a written notice on the defendant's attorney to the same effect. The plaintiff caused a fresh notice of action to be served, and an action was commenced in the Court of Queen's Bench for 100*l.* damages. The defendant's attorney then applied for and obtained a writ of certiorari to remove the cause from the

A justice of the peace sued in a County Court for an act done in the execution of his office, having given notice, under the 11 & 12 Vict. c. 44, s. 10, that he objects to being sued in the County Court, cannot after such notice remove the plaint into the superior Court by certiorari.

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County Court into this Court. On the 19th June, the day of hearing in the County Court, the plaintiff's attorney served a notice on the clerk of the County Court that the plaintiff had abandoned his suit. The defendant's attorney swore that the chief reason for giving the notice that the defendant objected to try in the County Court, was in order to facilitate the application for a certiorari.

*Huddleston* now shewed cause.—The 11 & 12 Vict. c. 44, s. 10, enacts that “no action shall be brought in any such County Court against a justice of the peace for anything done by him in the execution of his office if such justice shall object thereto; and if within six days after being served with a summons in any such action, such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action, that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void.” The words “proceedings in the action” in this section must be construed proceedings in furtherance of the action. Neither the certiorari nor the return to the writ of certiorari is a proceeding in the action. When a justice of the peace has given notice of his objection to being sued in the County Court, either the plaintiff or the defendant may remove the cause by certiorari into a superior Court and proceed there. The certiorari is in effect a discontinuance of the action in the County Court. Suppose there had been an order staying further proceedings, a discontinuance would have been no breach of it. The return to the writ of certiorari is the act of the County Court answering the inquiry of the superior Court, and informing it of the state of the cause. The effect of the return is, that the cause is removed into the superior Court, and when it is so removed, the plaintiff has a right to go

on with the cause. [Branwell, B.—Every man has a right to begin and go on with an action to redress a wrong done. Here, if in the original suit the plaintiff had claimed less than five pounds the plaint would not have been removable as of right. Indeed, before the passing of 19 & 20 Vict. c. 108, s. 38, it could not have been removed at all.]

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POLLOCK, C. R.—I am of opinion that this rule must be absolute. The notice given put an end to the proceedings in the County Court, and the plaintiff was in the same position as if no action had ever been brought.

MARTIN, B.—I am of the same opinion. When the justice has exercised his right of election, the proceedings in the County Court cease altogether and are wholly determined.

BRANWELL, B.—I am of the same opinion. I think that the defendant's notice terminated the proceedings in the County Court altogether, and that the suit could not be revived in the superior Court at the defendant's option. There should never be a certiorari where a procedendo could not be awarded.

Rule absolute, with costs.

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County Court into this Court. On the 19th June, the day of hearing in the County Court, the plaintiff's attorney served a notice on the clerk of the County Court that the plaintiff had abandoned his suit. The defendant's attorney swore that the chief reason for giving the notice that the defendant objected to try in the County Court, was in order to facilitate the application for a certiorari.

Huddleston now shewed cause.—The 11 & 12 Vict. c. 44, s. 10, enacts that “no action shall be brought in any such County Court against a justice of the peace for anything done by him in the execution of his office if such justice shall object thereto; and if within six days after being served with a summons in any such action, such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action, that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void.” The words “proceedings in the action” in this section must be construed proceedings in furtherance of the action. Neither the certiorari nor the return to the writ of certiorari is a proceeding in the action. When a justice of the peace has given notice of his objection to being sued in the County Court, either the plaintiff or the defendant may remove the cause by certiorari into a superior Court and proceed there. The certiorari is in effect a discontinuance of the action in the County Court. Suppose there had been an order staying further proceedings, a discontinuance would have been no breach of it. The return to the writ of certiorari is the act of the County Court answering the inquiry of the superior Court, and informing it of the state of the cause. The effect of the return is, that the cause is removed into the superior Court, and when it is so removed, the plaintiff has a right to go

on with the cause. [*Bramwell*, B.—Every man has a right to begin and go on with an action to redress a wrong done. Here, if in the original suit the plaintiff had claimed less than five pounds the plaint would not have been removable as of right. Indeed, before the passing of 19 & 20 Vict. c. 108, s. 38, it could not have been removed at all.]

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POLLOCK, C. B.—I am of opinion that this rule must be absolute. The notice given put an end to the proceedings in the County Court, and the plaintiff was in the same position as if no action had ever been brought.

MARTIN, B.—I am of the same opinion. When the justice has exercised his right of election, the proceedings in the County Court cease altogether and are wholly determined.

BRAMWELL, B.—I am of the same opinion. I think that the defendant's notice terminated the proceedings in the County Court altogether, and that the suit could not be revived in the superior Court at the defendant's option. There should never be a certiorari where a procedendo could not be awarded.

Rule absolute, with costs.

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Jan. 26.

ROGERS v. TAYLOR.

A declaration stated that certain lands were in the occupation of a tenant of the plaintiff, the reversion belonging to him, and that the defendant wrongfully dug out of the lands large quantities of stone, sand, and soil; and carried away the same; and made large holes, excavations, and cuttings in and through parts of the lands, and erected large mounds and banks of earth and rubbish in and upon other parts of the lands, so as thereby permanently to alter, damage, injure and spoil

the surface of the lands. Plea: that before any of the times when, &c., R. was and still is seized in fee of all the mines and quarries of stone under the earth or upon the earth, within certain parts of the lordship of B., and that R. and all those whose estate he had and has of and in the said mines and quarries within the said parts of the said lordship, from time whereof the memory of man is not to the contrary, have been used and accustomed of right, and still of right are used and accustomed, as often as it might be necessary for the purpose of effectually getting, winning, or working the said mines or quarries, within the said parts of the said lordship, to enter into and upon any lands within the said parts, within or under which the said mines or quarries were situate, such lands being or having been part of the waste of the lordship, and to dig, excavate, and cut into and through the same lands unto the stone of the said mines and quarries, and out of the holes and excavations so made to raise, dig and get the stones of the said mines and quarries and carry away the same, doing no more than necessary for the purpose aforesaid.—The plea then stated that R. demised a quarry of stone, situate within and under the lands of the plaintiff in the declaration mentioned, being parcel of the said mines and quarries of stone within the said parts of the said lordship, to the defendant from year to year, and the plea then justified the acts complained of in the exercise of the above mentioned right. There were two other pleas under the Prescription Act, 2 & 3 Wm. 4, c. 71, alleging an enjoyment of the right by the defendant as occupier of the quarry for the respective periods of forty and twenty years. On demurrer,—*Held*, that the pleas were good, for the right claimed was not unreasonable and might have originated in grant.

carrying away the same; and as to the converting and disposing of the said stone to the defendant's own use; and as to the making the said holes, excavations, &c., and erecting the said mounds, &c., the defendant says, that before any of the times when, &c., Richard, Marquis of Westminster, was, and thence hitherto hath been, and still is, seized in his demesne as of fee, of and in all the mines and quarries of stone under the earth, or upon the earth, within certain parts of the lordship of Bromfield and Yale, in the county of Denbigh, with their appurtenances; and that the said Marquis, and all those whose estate he had and has, of and in the said mines and quarries within the said parts of the said lordship, and his and their tenants and farmers, occupiers of the said mines and quarries, &c., from time whereof the memory of man is not to the contrary, have been used and accustomed of right, and still of right are used and accustomed, as often as it might be necessary for the purpose of effectually getting, winning or working the said mines or quarries, or any of them, within the said parts of the said lordship, to enter into and upon any lands within the said parts, within or under which the said mines or quarries were respectively situated, such lands being or having been part of the waste of the said lordship, and to dig, excavate and cut into and through the same lands, unto the stone of the said mines and quarries, and out of the holes or excavations so made, to raise, dig and get the stones of the said mines and quarries, and to seize, take and carry away the same, and convert the same to their own use; doing no more than necessary for the purpose aforesaid. And the defendant says, that the said Marquis being so seized, before any of the said times when, &c., demised a certain quarry of stone, situate within and under the said lands of the plaintiff, in the declaration mentioned, being parcel of the said mines and quarries of stone within

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the said parts of the said lordship, to the defendant; to have and to hold the same to the defendant for one year thence next ensuing, and so on from year to year so long as the defendant and the said Marquis should respectively please: by virtue whereof the defendant then, and before any of the said times, when, &c., entered into and upon the said quarry of stone with the appurtenances so demised, and became and was thereof possessed for the said term, and so continued until, at, and after the said times when, &c. And the defendant says, that the demised quarry, being situate within and under the said lands in the declaration mentioned, and the said lands being within the said parts of the said lordship, and having been part of the waste thereof, it became and was necessary, before and at the times, when, &c., for the purpose of effectually getting, working and winning the said demised quarry, to enter into and upon the said lands, and to dig, excavate and cut into and through the same unto the stone of the said quarry, and to take out and carry away the stone of the said quarry through the holes, excavations and cuttings, so dug and made as hereinafter mentioned: wherefore the defendant, at the times, when, &c., because the said demised quarry could not be otherwise effectually worked, did enter into and upon the said lands for the purpose last aforesaid, and did then and there for that purpose dig, excavate and cut the said holes, excavations and cutting in and through the said lands unto the stone of the said quarry, and out of the same quarry dug, excavated, took and carried away the said stones in the declaration mentioned, being part of the stones of the said quarry so demised to the defendant, and carried away the same, and converted the same to his own use; and in so doing necessarily and unavoidably dug out of the said lands the said sand and soil of the said lands, and therewith and thereby

made the same mounds and banks of earth and rubbish upon the parts of the said lands as in the declaration mentioned, and there left the same for the use of the plaintiff; doing no more than necessary for the purposes aforesaid: quæ sunt eadem, &c.

The fifth and sixth pleas were under the Prescription Act, 2 & 3 Wm. 4, c. 71, alleging an enjoyment of the right by the defendant as occupier of the quarry for the respective periods of forty years and twenty years.

Demurrer to the fourth, fifth and sixth pleas.

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Welsby argued in support of the demurrer (a).—The prescription alleged is bad in law. It appears that the original grant must have been subject to a right on the part of the grantor to destroy a part of the surface from time to time without making compensation to the grantee. Such a right, whether created by way of reservation or exception, is repugnant to the grant, and bad. In Sheppard's Touchstone, p. 79, it is said, "if the exception be such as is repugnant to the grant, and doth utterly subvert it, and take away the fruit of it, as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grass of it, or grant a manor excepting the services; these are void exceptions." [Martin, B.—May not coal mines be reserved?] There is a distinction between quarries, the working of which destroys the surface, and mines. It may be too, that where a right to coal mines is reserved, the party exercising it is bound not to injure the surface; for instance, he could not take the whole of the coal, and let down the surface; *Harris v. Ryding* (a). [Martin, B.—Your argument would go to this extent, that

(a) April 30, 1856. Before *Pollock*, C.B., *Alderson*, B., *Martin*, B., and *Bramwell*, B. (b) 5 M. & W. 60.

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a man could not reserve a right to go upon land granted by him, and dig a pit for the purpose of getting coal.] A man cannot reserve a right permanently to injure or *destroy* the surface of land granted by him. Here, if the quarries extend over the whole land, the prescription alleged would give to the grantor a right to destroy the whole surface. In *Hilton v. Lord Granville* (a) it was held that a prescription or custom within a manor for the lord, who is seised in fee of the mines and collieries therein, to work them under any dwelling houses, buildings and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling houses or other buildings within or parcel of the manor, by or for the purpose of working the said mines, is void as being unreasonable. Lord Denman, C. J., there said, "a claim destructive of the subject matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." In *Broadbent v. Wilks* (a), it was held to be an unreasonable custom that when the lord of the manor, or his tenants of certain coal mines within the manor, have sunk pits in the freehold lands within and parcel of a manor, for the purpose of getting the coals, that the lord or his tenants of the said colliery should lay the coals when got and the earth and rubbish in heaps on the land near to such pits, there to remain and continue, and should take away in carts and waggons part of the coals, and burn and consume and make into cinders the other

(a) 5 Q. B. 701. See *Humphries v. Brogden*, 12 Q. B. 739, 753.

(b) Willes, 360; 1 Wilts. 63.

parts at his and their will and pleasure, because the exercise of such a right might deprive the tenant of the whole profits of the land. [Martin, B.—Does the same law apply in cases of custom and prescription? Prescription is founded on the agreement of the parties; but it is a rule that a custom must be reasonable.] In *Clayton v. Corby* (a) a prescriptive right claimed by the owner of a brick kiln to dig and take away so much clay as was from time to time wanted for the purpose of making bricks, was held to be unreasonable and void. If that claim had been held valid, the effect would have been that the defendant would have had a right to take the whole of the soil of the plaintiff's close.

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J. Brown argued for the defendant in the present term (Jan. 26).—The defendant does not prescribe for a profit à prendre, but for an easement only, viz., a way for the purpose of working the quarry and carrying away the stone. The right is only claimed in respect of lands which are or have been part of the waste; and if such a claim is reasonable as to waste land, it does not cease to be so because the land is cultivated. It is objected that such a custom could not originate in grant; but there is nothing on the face of the pleas to shew that the reservation was made by the owner of the quarry. The Crown, as owner of the entire manor, may have granted the quarry with the right over the surface land. [Watson, B., referred to *Dand v. Kingscote* (b) and *The Earl of Cardigan v. Armitage* (c).] A mere conveyance of the quarry would carry, as incident to it, all that is now claimed, the maxim being “quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest.” In *Pomfret v. Riccroft* (d) the law is thus

(a) 5 Q. B. 415.

(b) 6 M. & W. 174.

(c) 2 B. & C. 197.

(d) 1 Saund. 323.

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laid down by *Twisden*, J., "When the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me." Also in a note to that case, 1 Wms. Saund. 323, it is said: "So where a man leases his land and mines, where there are no open ones the lessee may dig for them." That principle is the foundation of a way of necessity, and it has been recognised and adopted in several modern cases. Thus, in *Hinchliffe v. The Earl of Kinnoul* (*a*), it was held that under a demise of a house, the lessee had a right of way over a passage to a coal-shoot which was necessary for the convenient occupation of the house. So in *Dand v. Kingscote* (*b*), where lands were conveyed in fee farm "excepting and reserved out of the grant all mines of coal," &c., "with liberty of sinking and digging pits;" it was held that the right of erecting a steam-engine and other machinery necessary for draining the mines, with all proper accessories, passed as incident thereto. [Martin, B.—Is there any authority for permanently laying rubbish on the land? *Welsby* referred to *Broadbent v. Wilks* (*c*).] The defendant claims a prescriptive right not only to excavate the stone but also the soil of the land, and therefore he must have the right to put the rubbish on the land. *Wilks v. Broadbent* is distinguishable on several grounds: first, the right was claimed by way of *custom* for the lord of the manor to place coals and rubbish on the land of his tenant: secondly, the custom as alleged was uncertain, the word "near" being indefinite: thirdly, it was not alleged that the laying coals, &c., on the tenants' land was necessary

(*a*) 5 Bing. N. C. 1.

(*b*) 6 M. & W. 174.

(*c*) Willes, 360; 1 Wilts. 63.

for the use or enjoyment of the pits. The Court there said, that there was no weight in the objection that the custom is only beneficial to the lord and greatly prejudicial to the tenants, "for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on the account of this disadvantage to his tenant." So here, the land may have been granted to the plaintiff's predecessor for a mere nominal consideration, by reason of its being subject to the risk of being partially covered with rubbish. If the person who worked the quarry were bound to remove the rubbish, the expense of so doing might render the quarry worthless.

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Welshy, in reply.—The plea affords no answer to the allegation that the defendant did the acts in question "so as thereby *permanently* to alter, damage, injure and spoil the surface and soil of the lands." It is not denied that a grant of a quarry will carry with it, as incidental to the grant, all reasonable means of getting at the stone; nor is it denied that there may be a custom or a prescriptive right to work a quarry where they may be enjoyed consistently with the rights of the owner of the surface; but where the custom or prescription is so large and indefinite as to destroy the whole surface, it is void. In *Broadbent v. Wilks*, the custom was alleged "at the will of the lord." Here the right claimed is without limitation. The plea, indeed, alleges that no more was done than was necessary for the purpose of working the quarry, but that might deprive the plaintiff of the whole of the cultivated land. [*Martin, B.*—This claim may have originated in a grant; and if so, it is within the terms of the Prescription Act, 2 & 3 Wm. 4, c. 71.] A claim of right in *alieno solo*, in order to be valid, must be made with some limitation or

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restriction : *Clayton v. Corby* (a), *Wilson v. Willes* (b), *Peppin v. Shakespear* (c). Compensation should be made to the owner for his loss of the use of the soil.

POLLOCK, C. B.—We are all of opinion that the pleas are good. The defendant has a right to get the stone, and to do the wrong complained of, because it was necessary in order to get the stone. There is nothing to shew that the defendant had not the right claimed, and it is expressly stated that he enjoyed it for the necessary purpose of getting the stone. It is alleged, and not denied, that the quarry was the property of the defendant's lessor; and the case does not fall within the principle of any of the decisions which have been referred to, as the right claimed is not unreasonable and may have originated in a grant.

MARTIN, B.—I cannot conceive how the defendant can realise his property in the stone except by doing the acts complained of.

WATSON, B.—I am also of opinion that the defendant is entitled to judgment. It is quite clear that a plea under the Prescription Act should set up such a claim as might exist by custom, prescription, or grant. It is also clear that the owner of land may grant the mines, with liberty to the grantees to dig pits and carry the coal over the land. The case of *The Earl of Cardigan v. Armitage* (d) is an authority to that effect. Another case is *Dand v. Kingscote* (e), where there was a reservation out of the grant of all mines of coal, together with sufficient way

(a) 5 Q. B. 415.

(d) 2 B. & C. 197.

(b) 7 East, 121.

(e) 6 M. & W. 174.

(c) 6 T. R. 748.

leave to and from the mines, and a question was raised as to whether under that reservation the coal owner had a right to make a railway with cuttings and embankments, and fenced in so as to exclude the owner of the soil. That point was not decided, but the Court held that there passed by the reservation such a description of way leave, and in such a direction, as would be reasonably sufficient to enable the coal owner to get all the seams of coal; and therefore he was not confined to such description of way as was in use at the time of the grant, which was in the reign of Charles I. *Broadbent v. Wilks* (*a*) decided that the custom must be reasonable and definite. In *Bourne v. Taylor* (*b*) the defendant justified under the lord of a manor, as being seised in fee of the mines of coal under the copyhold tenements, together with the liberty of boring for and getting the coal. No doubt such a right may exist in a manor; and if anything done is not within the Prescription Act, that must be the subject of a new assignment. Putting soil upon the land does not make the prescription bad. A great deal of rubbish must necessarily come up with the stone and that must be placed on the land, if not carted away.

Judgment for the defendant.

(*a*) Willes, 360; 1 Wils. 68.

(*b*) 10 East, 189.

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Jan. 12.

HEARD v. EDEY.

Under the 19 & 20 Vict. c. 108, s. 30, where a defendant suffers judgment by default in a case in which a superior Court and a County Court have concurrent jurisdiction, it is not discretionary, but imperative on the Court or a Judge to give the plaintiff costs.

THIS was an action on a bill of exchange for £1. Judgment was signed against the defendant for want of an appearance. A summons was afterwards taken out, calling on the defendant to shew cause why the plaintiff should not recover his costs, on the ground that the plaintiff and defendant resided more than twenty miles distant from each other. The summons was heard before *Martin, B.*, who, upon an affidavit of the fact, made an order accordingly, with liberty to the defendant to apply to the Court.

Prentice had obtained a rule nisi to rescind the order of *Martin, B.*, against which

G. B. Hughes now shewed cause.—It was imperative on the Judge to make the order, upon proof that the plaintiff resided more than twenty miles from the defendant. Under the original County Court Act, 9 & 10 Vict. c. 95, ss. 128, 129, it was necessary for the defendant to apply for leave to enter a suggestion to deprive the plaintiff of costs. The 13 & 14 Vict. c. 61, s. 11, rendered a suggestion unnecessary, and cast on the plaintiff the onus of shewing that he was entitled to costs, except in the case of judgment by default: *Glynne v. Roberts* (a). The 13th section enacted, that if the plaintiff should satisfy the Court or a Judge, that the action was brought for a cause in which the superior Court and County Court had concurrent jurisdiction under the former Act, &c., the Court or Judge "may thereupon, by rule or order, direct that the plaintiff shall recover his costs." That section has been repealed by the

(a) 9 Exch. 253.

15 & 16 Vict. c. 54, s. 4, which enacts, "that in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of such Act, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the Court, &c., or a Judge at Chambers, &c., that such action was brought for a cause in which concurrent jurisdiction is given to the superior Courts, by the 128th section of the 9 & 10 Vict. c. 95, &c., the Court, or the said Judge shall thereupon, by rule or order, direct that the plaintiff shall recover his costs." Then came the 19 & 20 Vict. c. 108, s. 30, which enacts, "Where an action of contract is brought in one of her Majesty's superior Courts of record to recover a sum not exceeding 20*l.*, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs, unless upon an application to such Court or to a Judge of one of the superior Courts, such Court or Judge shall otherwise direct." The effect of that enactment is to remove the previous exception of judgment by default, and to subject that case to the same incidents with regard to costs as other cases. These several statutes should be construed together. The words in the 30th section of the 19 & 20 Vict. c. 108, "unless such Court or Judge shall otherwise direct," mean unless the Court or Judge shall direct according to the rules of law. In *Macdougall v. Paterson* (*a*), it was held the word "may," in the 13th section of the 13 & 14 Vict. c. 61, was not used to give a *discretion*, but to confer *power* upon the Court and Judges; and that they were bound to exercise it when the necessary facts appeared.

Prentice, in support of the rule.—The 30th section of the 19 & 20 Vict. c. 108, does not make it imperative on the

(*a*) 11 C. B. 755.

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Court or Judge to give costs in the case of judgment by default, but merely confers a discretionary power. The language of that enactment differs materially from that of the 13 & 14 Vict. c. 61, s. 13, and the 15 & 16 Vict. c. 54, s. 4. There is good reason for the difference. Where a trial takes place, the facts of the case appear, and the Judge has power to certify that it was a proper case to be tried in the superior Court. [Martin, B.—Another point was raised before me at Chambers, viz.,—whether the application should be ex parte, or whether a rule or summons is required: in the latter case the costs would be doubled.] Whenever a statute provides that application shall be made to the Court or a Judge, it means that it shall be made according to the practice of the Court. [Martin, B.—My brothers Willes and Crompton, and myself thought that in this case there should be a summons.]

*Cur. adv. vult.*

MARTIN, B., now said.—All the Judges are of opinion that, according to the true construction of the 19 & 20 Vict. c. 108, s. 30, the case of judgment by default is placed on the same footing with respect to costs as a judgment after verdict. The rule will therefore be discharged.

With respect to the other question, it is probable that some new rule will be promulgated to regulate the practice.

Rule discharged.



1857.

## KNAPMAN v. PRYER.

Jan. 29.

ON the 4th of December this cause was tried, under a writ of trial, before the under sheriff of Devon, when a verdict was found for the plaintiff with 6*l.* damages, and no application was made for a certificate for costs. The writ of trial was returnable on the 5th of December. On the 9th a summons was taken out before a Judge at Chambers, calling on the defendant to shew cause why the plaintiff should not recover his costs on the ground that the plaintiff and defendant resided more than twenty miles distant from each other. That summons was heard on the 12th December, before *Martin*, B., and dismissed. The plaintiff afterwards applied to the under sheriff, who granted a certificate for costs. The certificate had no date, but it was stated to have been granted on the 17th December. The plaintiff then taxed his costs and signed final judgment. On the 24th of December an order was made by *Watson*, B., setting aside the taxation and the Master's allocatur, and the judgment so far as related to the costs. A rule was then obtained, calling on the defendant to shew cause why the order of *Watson*, B., should not be set aside, and the plaintiff have judgment for his costs.

The presiding officer on a writ of trial has no power, under the 13 & 14 Vict. c. 61, s. 12, to certify for costs after he has returned the writ.

*Lush* shewed cause.—The under sheriff had no power to grant the certificate for costs. The 12th section of the County Court Extension Act, 13 & 14 Vict. c. 61, enables the Judge, "or other presiding officer," to certify for costs. That is a judicial power, and it terminated when the writ of trial was returned. The under sheriff is in the position of an arbitrator who has made his award. In *Mortimer* v.

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Preedy (a) the writ of trial was returnable on the 19th of January: a court was holden on the 18th, which was adjourned to the 20th, on which day the cause was tried, and this Court was inclined to think that there was a mistrial, and that application ought to have been made to a Judge to have the time extended. In *Ashburton v. Sykes* (b), where the trial took place on a day subsequent to that on which the writ was returnable, it was held that the trial was void, and that the fact of the defendant having appeared and defended was immaterial, for the objection was one which could not be waived.

Field, in support of the rule.—The under sheriff had power to certify, and the certificate was properly granted. After the return of the writ of trial the under sheriff has no power to try the cause, for his jurisdiction to try depends on the 3 & 4 Wm. 4, c. 42, s. 17; but his jurisdiction to certify for costs is derived from the 13 & 14 Vict. c. 61, s. 12. Therefore the cases decided under the 3 & 4 Wm. 4, c. 42, are no authority on this point. In *Tharratt v. Trevor* (c) *Parke*, B. expressed an opinion that a certificate might be granted at any time before the costs were taxed. Therefore, in this case, the Court or a Judge might have granted a certificate, under the 13 & 14 Vict. c. 61, s. 12, and that statute does not limit the jurisdiction of the under sheriff. [Pollock, C. B.—This jurisdiction is limited by the 3 & 4 Wm. 4, c. 42. Martin, B.—When the writ of trial is returned this jurisdiction is at an end.] The power of the under sheriff to certify is co-ordinate with that of the Court or a Judge.

POLLOCK, C. B.—We are all of opinion that the rule

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| (a) 3 M. & W. 602. | (b) 1 D. & L. 133. |
| (c) 6 Exch. 187. | |

must be discharged. The writ of trial commands the sheriff to summon a jury and try the issue, and it goes on to say, "and when the same shall have been tried in manner aforesaid, we command you that you make known to the Barons of our said Exchequer at Westminster, what shall have been done by virtue of this writ, with the finding of the jury indorsed, on the 5th day of December next." Therefore, after the writ was returned, the under sheriff had no power to certify for costs. I should observe that a certificate of this kind ought to bear a date.

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MARTIN, B.—I am of the same opinion. My belief is, that the under sheriff's jurisdiction ceased when he returned the writ; at all events he had no authority to do any thing after the day specified for the return. After an application had been made to a Judge and refused, the plaintiff ought not to have gone behind the back of the other party and obtained a certificate. When the application was made to the Judge and dismissed, the matter ought to have ended.

WATSON, B.—I am of the same opinion. When the matter was before me at Chambers, I entertained a strong opinion that when the under sheriff returned the writ this jurisdiction was at an end, at the same time I thought that the plaintiff might appeal to the Court if he wished. Now that I have heard the argument, it seems to me that the under sheriff had jurisdiction up to the date of the return, or until the writ was actually returned; but it is quite clear that he had no power to grant this certificate long after the return. In the ordinary course of practice no amendment can be made in the return of a writ unless by leave of the Court. Here the officer has taxed the costs on a wrong postea.

Rule discharged.

1857.

Jan. 31.

Ross and Hodgson v. MONTEFIORE.

A defendant was held to bail on an affidavit, stating that he had obtained money at the Cape of Good Hope by means of a forged letter, and having been charged with such forgery before a magistrate here, had been discharged, on the ground that the offence was not shewn to have been committed within the jurisdiction of the Courts of this country: that it was believed that evidence would be obtained of offences committed within such jurisdiction; and that the parties therefore believed that it was his intention immediately to quit this country. The defendant applied to the Court to discharge him out of custody. He did not deny the charges, but swore that he did not intend to quit England.—The Court refused to discharge him.

LUSH had obtained a rule calling on the plaintiffs to shew cause why an order of *Bramwell, B.*, for a writ of capias should not be rescinded, and why the defendant should not be discharged out of the custody of the sheriffs of London.—From the affidavit of the plaintiff Hodgson, on which the order was obtained, it appeared that the defendant was indebted to the plaintiffs in 81*l*. for money lent by the plaintiffs at the Cape of Good Hope, upon the faith of the genuineness of a certain letter purporting to be signed by Messrs. Chalmers, Guthrie & Co., of Idol Lane, London, and to be addressed to the plaintiff Ross at the Cape of Good Hope, which said letter the plaintiff Hodgson believed was a forgery: that on the 10th of January the defendant was charged before the Lord Mayor with forging this letter and several others, but was ultimately discharged from custody on the ground that there was no evidence of the offences so charged having been committed within the jurisdiction of the Courts here: that he believed that if the defendant remained in England he would again be charged with the said forgeries on the discovery of further evidence, as he verily believed that some part of the said offences was committed within the jurisdiction of the English Courts, and that for the reasons above he believed that if the defendant was discharged from custody he intended to quit England.—The clerk of the plaintiff's attorney swore that one Whittle, a bailiff, had arrested the defendant as an absconding debtor, and that Whittle informed him that he believed that the defendant was about to give bail for the debt for which he was detained,

and was very anxious to be immediately discharged, and that if he was discharged from custody he intended to quit England.

The defendant in his affidavit swore that he left the Cape of Good Hope and came to England with the intention of immediately marrying a lady to whom he was and continued to be engaged to be married, and of residing with her in England, and not elsewhere; that the lady had visited him daily since his imprisonment; and that immediately on being discharged out of custody he intended to marry her and reside with her in London: that on leaving the Cape of Good Hope he did not intend, and still did not intend, to quit England, but that he intended to reside in London: that he was not apprehensive of any evidence arriving from Cape Town whereby he could be charged with any criminal offence punishable in England; that he came to England freely and voluntarily, and not to avoid prosecution in Cape Town, although he was threatened therewith, and although he had taken legal advice, from which he was informed that he need not be under any apprehension as to the result of criminal proceedings at Cape Town.—The defendant's attorney, in his affidavit, set out a letter from the lady referred to by the defendant, in which she stated that the engagement was one of many years standing, and that the defendant intended fulfilling it at the commencement of the year. The defendant's attorney swore, that from conversations with the lady and her sister he believed that the contents of the letter were true, and also that the affidavit of the defendant with reference to the marriage was true and according to the facts.

In his affidavit in reply the plaintiff's attorney stated that the complicity of the defendant in enormous crimes

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of forgery and fraud had been completely proved ; and both he and his clerk, who had the management of the charges of forgery, when the defendant was before the Lord Mayor, stated that they believed that if discharged the defendant would leave England in order to avoid being further prosecuted, on the production of further evidence which they verily believed would enable them to prosecute the defendant with every probability of his being convicted of his crimes.

Hawkins now shewed cause.—It appears from the affidavits on behalf of the plaintiff that it is probable that evidence will be obtained of offences committed within the jurisdiction of the Courts here. The defendant does not deny it; he only says, that he did not intend to quit England, which will hardly be believed, considering the peril to which the defendant subjects himself by remaining. The lady does not state that she intends to reside with him in England, nor even that she intends to marry him. The only person who alleges that the defendant is not going to quit England is the defendant himself. [Bramwell, B.—In answer to the affidavit of the defendant, the plaintiff might have been put in the affidavits of persons stating that they would not believe him on his oath. Here the affidavits in reply give a reason why the defendant should not be believed on his oath].

Field, in support of the rule.—The original affidavits do not disclose any ground for the arrest of the defendant. The only fact is, that the defendant has committed forgery out of the jurisdiction of the Courts of this country. The mere suggestion that he has committed other offences is not sufficient.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. The circumstances disclosed in the original affidavits are such as must have a strong tendency to satisfy every one that, if discharged, the defendant would not remain twenty-four hours in this country. He is charged with obtaining money by means of a forged letter, and he does not deny it. The lady in her letter says nothing as to the intention of the defendant to reside in England, and his attorney only says, that he believes the statement as to the marriage in the affidavit of the defendant to be true.

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MARTIN, B., and BRAMWELL, B., concurred.

Rule discharged (*a*).

(*a*) See *Graham v. Sandrinelli*, 16 M. & W. 191.

ANDREWS v. SAUNDERSON AND NICHOLLS.

JAN. 30.

THIS was a motion to discharge the defendant Saunderson out of custody, on the following grounds:—

An interpleader order had been obtained, at the instance of the sheriff, to try the question of ownership of certain goods taken in execution. The issue was tried before Lord Campbell, C. J., without a jury, and he decided that the goods belonged to the plaintiff. The question of costs having been reserved, it was ordered that the defendants should pay to the plaintiff the costs of and relating to the interpleader order, the issues relating thereto, and the trial thereof. The costs were taxed at 62*l*. The plaintiff afterwards caused a writ of fieri facias to be issued for the

Upon a judgment against two defendants, if the sheriff makes a seizure of the goods of one under a *f. fa.*, though he afterwards abandons the seizure, the plaintiff cannot take the other defendant under a *ca. sa.* till the writ of *f. fa.* has been returned.

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amount of these costs, under which the Sheriff of Bedfordshire seized the goods of the defendant Nicholls. After remaining on the premises of the defendant Nicholls for several hours, the sheriff withdrew, notwithstanding there were goods sufficient to satisfy the claim. No return was made to the writ of fieri facias, but the plaintiff afterwards caused a writ of capias ad satisfaciendum to be issued against Saunderson, who was thereupon arrested. Nothing was, in fact, realized under the fieri facias.

Atherton, in support of the motion.—The taking of the defendant Saunderson in execution, after a seizure under the writ of fi. fa., and before any return had been made, was an irregularity, and he is therefore entitled to be discharged. The only distinction between this case and that of *Miller v. Parnell* (*a*) is, that here the goods seized under the fi. fa. were those of a co-defendant. But the rule in that case is laid down generally; and the reason of it is given by *Lens*, Serjt. in his argument, viz. "that the writ of fieri facias while unreturned would always be a sufficient plea for the plaintiff or the sheriff in trespass for the seizure of the goods, and that it therefore ought to be returned, because the plaintiff ought not, in justice, to be furnished at the same time with a legal justification for taking and detaining both the goods and the body." The rule is also stated in Archbold's Practice, by Chitty and Prentice, p. 552. It was recognized in *Chapman v. Bowlby* (*b*) and in *Knight v. Coleby* (*c*). In that latter case, however, the defendant having induced the sheriff to withdraw, by a fraudulent representation, was estopped from saying that there had been a levy. *Lawes v. Codrington* (*d*) is an authority to the same effect.

(*a*) 6 Taunt. 370.

(*b*) 8 M. & W. 249.

(*c*) 5 M. & W. 274.

(*d*) 1 Dowl. 30.

O'Malley shewed cause in the first instance.—In the case of *Chapman v. Bowlby* (*a*) the rule and the reasons for it are rightly stated, but the judgment of the Court proceeds on the ground that under the compromise something was realized. In the course of the argument *Parke*, B. said, “If there was any levy under the compulsion of the first writ, it ought to have been returned, and the second writ ought to recite that levy; and then it appears by the writ itself why it was issued for a less sum. The question, therefore, is, whether there was any levy, and the test of that will be, to consider whether the sheriff was entitled to poundage.” Every reason urged, in *Miller v. Parnell* (*b*), against allowing a ca. sa. to issue after a seizure under a fi. fa. where nothing has been realized, would apply to shew that the two writs could not be issued concurrently. In Tidd’s Practice, p. 1020, it is said “the first writ must be returned before a second execution can be taken out (*c*); for that must be grounded on the first writ, and recite that all the money was not levied thereon * * * if nothing be levied in the first writ it need not be recited in the second” (*d*). The reason why it is necessary that the writ should be returned is, that every writ must follow the judgment, and the plaintiff can have no right to execution for the whole amount of the judgment after a part of the debt has been satisfied by a levy under the first writ. *Dicas v. Warne* (*e*) and *Edmond v. Ross* (*f*) are distinguished by *Parke*, B. in *Chapman v. Bowlby* (*a*), expressly on the ground that there no levy had taken place [*Pollock*, C. B.—If a sheriff enters, may not that be the subject of a return? In *Hodgkinson v. Whalley* (*g*) the principle of this case seems

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| (<i>a</i>) 8 M. & W. 249. | (<i>d</i>) Citing <i>Edmond v. Ross</i> , |
| (<i>b</i>) 6 Taunt. 370. | 9 Price, 5. |
| (<i>c</i>) Citing <i>Coppendale v. De-
bonaire</i> , Barnes, 213; <i>Wilson v.
Kingston</i> , 2 Chitt. Rep. 208. | (<i>e</i>) 10 Bing. 341.
(<i>f</i>) 9 Price, 5.
(<i>g</i>) 2 C. & J. 86. |

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to be stated, so far as it can be said to be a matter of principle. It is there laid down that a *fi. fa. and ca. sa.* "may issue together, because the practice is not to enter them on the record if nothing is done. But if you execute one, you must make an entry of the return of that before you can award the other." It is pointed out that wherever anything has been done under the writ which may make it necessary for the sheriff to defend himself under the writ, what has been done cannot be treated as a nullity, and the writ must be returned.] In that case there was a substantive levy, and the Sheriff was entitled to poundage. [*Pollock, C. B.*—That is not the test, the question is not whether the sheriff is entitled to poundage, but whether anything has been done which renders the existence of the writ necessary for the justification of the sheriff].

POLLOCK, C. B.—I am of opinion that the rule must be made absolute. In *Chapman v. Bowby* *a)* this Court distinctly recognized and upheld *Miller v. Parnell* *(b)*. *Dicas v. Warne* *(c)* was shewn to be distinguishable upon the ground that there was in that case no levy at all under the first writ, the goods being already under a distress for taxes.

MARTIN, B.—I am also of opinion that the defendant is entitled to be discharged. My impression would have been that it was not necessary to make any return to a writ unless something had been levied under it; but the Court of Common Pleas in *Miller v. Parnell* held otherwise, and the rule there laid down has been adopted and constantly acted upon. The practice is correctly stated in *Archbold's Practice* by Chitty and Prentice. As to the

(a) 8 M. & W. 249.

(b) 6 Taunt. 370.

(c) 10 Bing. 341.

case of *Chapman v. Bowlby* (*a*) the defendant's counsel had a point upon which there was no doubt, and he relied upon it. The same reasoning which prevailed in *Miller v. Parnell* applies here, because Saunderson is entitled to the benefit of any satisfaction of the debt by Nicholls.

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Rule absolute, with costs, upon defendant undertaking to bring no action.

(*a*) 8 M. & W. 249.

HELLABY v. BROWN.

BROWN v. HELLABY.

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G. DENMAN had obtained a rule, calling on C. Hellaby to shew cause why the award of the arbitrator made in these causes should not be set aside.—The action of *Hellaby v. Brown* was brought by Hellaby, who had been the tenant of a farm belonging to Brown, to recover the value of his tenant right on quitting his farm. Brown pleaded a set-off. In *Brown v. Hellaby*, the first count of the declaration alleged that the defendant became tenant to the plaintiff of a certain messuage, lands and premises, on the terms that he would during the tenancy keep the premises in tenantable repair, and use the same in a tenantable and proper manner according to the custom of the country: that he had not kept the premises in tenantable repair, but had

An action brought by A. against B. and a cross-action by B. against A., were referred by separate orders of reference made under the 3rd section of the Common Law Procedure Act, 1854. The action by B. against A. contained counts for not using a farm in a tenant like-manner and for goods sold; and the defendant pleaded to the first count a

denial of the tenancy upon the terms alleged and performance of the agreement; and to the last count, never indebted, payment, and set-off. The arbitrator made his award on one piece of paper, awarding for the plaintiff in the first action, and that in the second action there was nothing due or payable from the defendant to the plaintiff; and he ordered that the costs of the award should be paid by B.

The Court remitted the award to the arbitrator that he might make two awards and find the issues specifically.

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used the messuage and lands in an untenantable and improper manner. The second count alleged that the plaintiff had let to hire to the defendant certain machinery upon the terms that he should take due care thereof; but that he had carelessly and negligently broken and destroyed one of the machines. There were also counts for goods sold, &c. To this action Hellaby pleaded: First, to the first count—Denial of the tenancy on the terms alleged. Secondly, to the same—Performance of the terms. Thirdly, to the second count—Payment of money into Court. Fourthly, to the residue—Never indebted. Fifthly, to the same—Payment. Sixthly, to the same—Set-off. The plaintiff took the money out of Court, and joined issue on the other pleas.

The causes had been referred by two separate orders of reference made upon separate summonses, in pursuance of the 3rd sect. of the 17 & 18 Vict. c. 125, to the award of the judge of the County Court of Staffordshire, who made his award in the following terms:—"I award in the first above mentioned action of *Hellaby v. Brown*, that there is due and payable from the defendant H. Brown to the plaintiff C. Hellaby, the sum of 135*l.* 13*s.* 8*d.* And that the said defendant, H. Brown, do forthwith pay the said sum, &c. And I further award that in the secondly above mentioned action of *Brown v. Hellaby*, there is nothing due or payable from the defendant C. Hellaby to the plaintiff H. Brown, beyond the sum of money already paid into Court by the said last mentioned defendant and taken out by the said last mentioned plaintiff; and that the said last mentioned plaintiff do not recover any thing further in the said last mentioned action. I also award that each of the said parties, C. Hellaby and H. Brown, shall pay his own costs of this reference. And that the costs of this award shall be paid by the said H. Brown."

**Boden** now shewed cause.—It is said that the issues in the second action are not disposed of; but it must be taken that all the issues have been found for the defendant, unless it appears on the face of the award that the arbitrator could not have so found them: *Humphreys v. Pearce* (*a*). It is for the other side to shew that there is something inconsistent and absurd in inferring from the finding that the arbitrator has decided all the issues: *Cooper v. Langdon* (*b*). [*Martin*, B.—The reasoning in *Humphreys v. Pearce* only applies when the finding is for the plaintiff.] Then it is said that there should have been two separate awards on separate pieces of paper. [*Pollock*, C. B.—A Judge often makes an order in two causes on the same piece of paper.] Notwithstanding they are written on one piece of paper, there are here in substance two awards; the arbitrator has distinctly adjudicated in each action. In *Smith v. Reece* (*c*) cross-actions were referred by one order of reference, subject to the certificate or award of an arbitrator; the arbitrator made two certificates on separate pieces of paper, and it was objected that this was not one award, but the objection was overruled.

**Hugh Hill** and **Denman**, in support of the rule—These orders of reference were made upon distinct summonses taken out separately in each action. The arbitrator directs that the costs of the award are to be paid by H. Brown. Upon this award judgment could not be signed for these costs under the 3rd section of the Common Law Procedure Act, 1854 (*d*), upon either order of reference.

**POLLOCK**, C. B.—I think that the award must be sent

(*a*) 7 Exch. 696.

(*c*) 6 D. & L. 520.

(*b*) 9 M. & W. 60; 10 M. &  
W. 785.

(*d*) See *Kendil v. Merrett*, 18  
C. B. 173.

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back to the arbitrator in order that the objections to it, which are purely technical, may be removed. He should make two awards.

MARTIN, B.—I am of the same opinion. The arbitrator should make two awards.

WATSON, B.—I also think that the case should go back to the arbitrator. He will then make two awards, and find the issues specifically.

Rule accordingly.

Jan. 20.

TOOKER v. SMITH.

An agreement for a lease contained a stipulation that the tenancy should continue until after two years notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed. Held, that it could not be implied that the stipulation as to the two years notice to quit was one of the terms under which the tenant held.

THE declaration stated, that the defendant became tenant to the plaintiff of a certain farm and lands at a certain rent, and subject to, amongst others, the terms following, that is to say, that the said farm and lands should be farmed, managed and cultivated according to the most approved four or five lain course or system of husbandry, as set down in a certain schedule then agreed to by the plaintiff and the defendant, that is to say, with respect to the five lain course, that not less than two fifth parts of the arable land thereof should be always in sown grass, and a two years ley, so as to be in a proper preparation for wheat, &c.; and with respect to the four lain course, that not less than one fourth part of the arable land thereof should always be in sown grass, &c.; and upon the further terms, that the said tenancy should continue until the one party should give to the other a two years notice, in writing, of his intention to put an end to the same; such notice to

be given on or before the 29th day of September, and to expire on the 29th day of September which should happen next before the expiration of two full years after such notice should have been given.—Averments: that the defendant continued and was tenant of the said farm upon the terms aforesaid during all the time thereafter mentioned; and that the plaintiff, during such tenancy, and upon the 29th day of September, 1854, gave to the defendant notice in writing to quit and deliver up to the plaintiff the possession of the said farm on the 29th day of September, 1856; and although the plaintiff hath always performed all things on his part, &c., yet the defendant did not farm, manage, or cultivate the said farm according to the most approved four or five lain course or system of husbandry; but on the contrary thereof, kept large quantities of the arable land in wheat, &c.

Plea, *inter alia*.—That the defendant never became or was tenant to the plaintiff of the said farm upon, under, or subject to the terms in the declaration mentioned.

At the trial before *Martin*, B., at the last Summer assizes for the county of Hants, an agreement containing the terms set out in the declaration, bearing date the 28th of August, 1846, was produced. It was signed by H. Pearson for the plaintiff, and by the defendant. The agreement was not under seal, and when first produced was unstamped, but was subsequently stamped as an agreement. The defendant had taken possession under the agreement, and occupied the farm and paid rent for it for some years, until his tenancy was determined by a two years notice to quit, expiring at Michaelmas, 1856. The learned Judge ruled that the contract as set out in the declaration was not proved, and the plaintiff was nonsuited.

M. Smith had obtained a rule to shew cause why the

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nonsuit should not be set aside and a new trial had, against which

*Kinglake*, Serjt., and *Poulden* shewed cause (January 17.)—The contract stated in the declaration was not proved. The instrument executed by the defendant is, in fact, a lease, and void as such by 8 & 9 Vict. c. 106, s. 3. The defendant holds upon such of the terms of it as are applicable to a tenancy from year to year: *Tress v. Savage* (a), *Arden v. Sullivan* (b), *Stratton v. Pettitt* (c). But some of the terms stated in the declaration are inconsistent with such a tenancy. First, there are the stipulations as to the four and five course system of husbandry. [ *Martin*, B.—That is not the difficulty; there is nothing inconsistent with a yearly tenancy in stipulations for the cultivation of lands upon any system the parties may choose to agree upon.] A tenancy from year to year cannot be made out of terms which have reference to a continuous holding for many years. [ *Watson*, B.—Lands might be let for one year to be cultivated upon the four course system.] Then there is the stipulation as to notice to quit. The tenancy from year to year, implied from holding over and the payment of rent, is subject to the condition that it may be determined by a six months notice to quit: *Doe d. Warner v. Browne* (d). Here, however, the tenancy is stated to be upon the terms that it shall continue until two years notice in writing shall have been given.

*Montague Smith*, *Phipson* and *Coleridge*, in support of the rule.—The terms of the notice to quit set out in the declaration are not inconsistent with the tenancy which the law implies from a tenant holding and paying rent

- (a) 4 E. & B. 36.  
 (b) 14 Q. B. 832.

- (c) 16 C. B. 420.  
 (d) 8 East, 165.

under an agreement for a lease, or a void or expired lease. [Martin, B.—In *Tress v. Savage* (*a*) Coleridge J. points out that the tenancy to be implied is a yearly tenancy determinable by six months notice to quit.] The time of quitting in the original lease is one of the terms which may be implied: *Doe d. Rigge v. Bell* (*b*). [Pollock, C. B.—If your argument was well founded, a stipulation that seven years notice should be given might be equally implied, and therefore there might be a lease for seven years by parol.] This case is not affected by the statutes, because no tenancy is implied which exceeds three years. An agreement for a lease for twenty-one years, with a stipulation that until a lease is granted the tenant shall hold upon the terms of it, subject to a two years notice to quit, may be a lease. It is probably not a yearly tenancy. If, instead of two years notice to quit, the period stipulated for was seven, that would be void under 8 & 9 Vict. c. 106, s. 3. Any agreement which would give a definite interest for a period not exceeding three years may be a good lease for that period. It will hardly be disputed that a tenancy, subject to a condition that it may be determined by a two years notice to quit, is capable of being created. It is not necessary to contend that the defendant is tenant from year to year. A yearly tenancy is often qualified by stipulations in the agreement for a lease. In *Doe d. Davenish v. Moffatt* (*c*) the tenant, during the last year of the tenancy was possessed of an anomalous estate; he was tenant for that year only. [Pollock, C. B.—A tenant holding upon the terms of an agreement for a lease was formerly considered to be merely a tenant at

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(*a*) 4 E. & B. 36.

*Davenish v. Moffatt*, 15 Q. B. 257;

(*b*) 5 T. R. 471. On this point they referred also to *Doe d. Tilt v. Stratton*, 4 Bing. 446; *Doe d.*

*Doe d. Thomson v. Amey*, 12 A. & E. 476.  
(*c*) 15 Q. B. 257.

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will; but the Courts have since held, that if rent is paid a tenancy from year to year shall be presumed. *Martin*, B.—It is a fallacy to assume that the term as to the four course system of husbandry cannot be implied. It is nothing more than an agreement that during each year that the tenancy shall continue a certain course of cultivation shall be pursued. *Watson*, B.—In fact nearly all the large estates throughout the kingdom are held from year to year upon such terms. *Pollock*, C. B.—You had better amend the declaration by striking out so much of it as relates to the two years notice to quit.]

Leave to amend within three weeks on payment of costs, otherwise the rule to be discharged.

Jan. 28.

BROWN v. FOSTER.

The rule as to privileged communications between counsel or attorney and client does not extend to facts of which the counsel or attorney of themselves obtain knowledge in the course of trial.

Counsel attended before a magistrate on behalf of a person charged with embezzlement, and a book was produced by the prosecutor in which it was the duty of the person charged to have entered a sum of money received by him, and there was no such entry. On a second examination, the book was again produced when the entry was found. The party charged having brought an action for a malicious prosecution.—*Held*, that the counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation.

**A**

At the trial before *Jervis*, C. J., at the Warwick Summer Assizes 1856, it appeared that the now plaintiff had been a clerk in the employ of the defendant, a builder at Birmingham. It was the duty of the now plaintiff as such clerk to collect money due to the defendant, and to enter the same, when received, in a day-book, and to transfer the

same, when paid, to the account of the defendant. A book was produced by the prosecutor in which it was the duty of the person charged to have entered a sum of money received by him, and there was no such entry. On a second examination, the book was again produced when the entry was found. The party charged having brought an action for a malicious prosecution.—*Held*, that the counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation.

account from thence to a cash-book. The defendant had caused the now plaintiff to be brought before a magistrate at the Birmingham Police Court on a charge of embezzlement, when counsel appeared on his behalf. It was proved that on the 17th November, 1855, the now plaintiff had received from one Cleaver 1*l.* on account of the defendant. The day-book and cash-book were produced, and examined both by the now plaintiff's counsel and the magistrate, and no entry of that sum was found in them. The now plaintiff was remanded on bail. At this time he had in his possession a key of the counting-house in which the books were kept. On a subsequent day he was again brought before the magistrate, and the day-book was again produced, when there was found in it, in the handwriting of the now plaintiff under the date of the 17th of November, 1855, an entry of 1*l.* received from Cleaver. The magistrate dismissed the charge, whereupon the present action was brought. It was contended on behalf of the defendant that the now plaintiff had obtained access to the day-book by means of the key which he had in his possession and had made the entry after his first examination before the magistrate. Previous to the close of the defendant's case the Lord Chief Justice observed, that the counsel who attended for the now plaintiff before the magistrate, and who was then in Court, could clear up the matter, and after consulting with *Cresswell*, J., his Lordship stated that his learned brother agreed with him that there was no objection to that counsel being examined, and he thought that the counsel ought to state what he knew about the matter. The counsel did not object to give evidence, and on examination stated that he believed that the entry was not in the book on the first hearing of the case before the magistrate. The Lord Chief Justice,

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in summing up, told the jury that the evidence of the counsel was really conclusive, and a verdict was found for the defendant.

Mellor, in last Michaelmas Term, obtained a rule nisi for a new trial on the ground (amongst others) of the improper reception of evidence, against which

Macaulay (Field with him) now shewed cause.—This is not the case of a privileged communication. It is true that the knowledge of the fact was obtained by the counsel whilst he acted as such, but he did not acquire that knowledge from any communication made to him by his client. The privilege only extends to matters which the client has put it in the power of the legal adviser to learn. It must, in some sense, be a communication which the client has made to him. A counsel or attorney may give evidence of a fact of which he became aware of his own knowledge or which was patent to his senses, notwithstanding he acquired the knowledge at the time he was professionally employed. Thus, if he has acquired a knowledge of handwriting, he might be called to prove it.

The Court then called on

Mellor and *Bittleston* to support the rule.—The information was acquired by the counsel whilst acting as such on behalf of the plaintiff before the magistrate, and therefore falls within the rule as to privileged communications. The privilege is for the protection of the client, and he alone can waive it. The subject was fully considered in *Greenough v. Gaskell* (a), where Lord *Brougham*, C., thus states the foundation of the rule:—“It is out of regard to the interests of justice, which cannot be upheld, and to the

(a) 1 Myl. & K. 98.

administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." The rule extends to all collateral information acquired by the legal adviser while acting in his professional character. Thus, an attorney is not compellable to state as a witness, whether a document shewn to him by his client in the course of a professional interview, was then stamped or not: *Wheatley v. Williams* (a). [Martin, B.—In *Phelps v. Prew* (b) it was held that an attorney was compellable to produce a deed of his client for the purpose of identification, as that did not involve any disclosure of its contents. So here, the counsel was only required to state what was the condition of the book.] In *Phelps v. Prew* there was no violation of professional confidence; here the counsel was called upon to give evidence of a fact which came to his knowledge while acting on behalf of his client. It is not as if the fact could be proved by any other person; the counsel having examined the book in his professional capacity was called upon to state the result of that search. The knowledge thus obtained is the same as if it had been directly communicated by the client. [Pollock, C. B.—A legal adviser may give evidence of a fact which is patent to his senses. If a question had arisen as to whether the magistrate wore a particular dress, might not the counsel or attorney be called to prove the fact? Martin, B.—Suppose an action on a charterparty, and that on a second trial a question arose as to whether the charterparty was stamped when it was produced at the first trial, could not the counsel or attorney be asked what they then saw on the face of the document?] Here the evidence was valuable solely because it was the evidence of the counsel.

(a) 1 M. & W. 533.

(b) 3 E. & B. 430.

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POLLOCK, C. B.—The rule must be discharged. I entertain no doubt whatever as to the admissibility of the evidence. The book was produced by the prosecutor, and the counsel for the present plaintiff did not acquire his knowledge of its contents from his client: he had no more means of information than any other person who examined the book.

MARTIN, B.—I am of the same opinion. I have listened with attention to the argument, but have heard nothing which creates in my mind the slightest doubt. The counsel was called to state, not what he learnt from his client, but whether on a particular occasion he saw a certain book, and whether a certain entry was then in that book. There is no breach of professional confidence in answering those questions. I agree that what passes between counsel and client ought not to be communicated and is not admissible in evidence, but with respect to matters which the counsel sees with his eyes, he cannot refuse to answer.

WATSON, B.—I am of the same opinion. No doubt it is the law, and for good reasons that all communications from clients to their counsel or attorneys are privileged at all times and on all occasions. In *Greenough v. Gaskell* (a), Lord Brougham, C., said:—"If touching matters which come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they knew only through their professional relation to the client, they are not only justified in withholding such matters but bound to

(a) 1 Myl. & K. 98.

withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as party or as witness." That is the rule; but if in the course of a trial, counsel or attorney see the state of a document produced by the opposite party, there is nothing to prevent them from giving evidence on a subsequent occasion as to the former state of that document. Here the document was produced, not by the client but by the prosecutor; and the counsel was only called upon to say what was the state of that document on the first occasion, that is, what he himself saw upon it, not what was communicated to him by his client.

Rule discharged.

POLLOCK v. TURNOCK.

JAN. 31.

THIS was an action on a bill of exchange, under the 18 & 19 Vict. c. 67. *Bramwell*, B., had made an order giving the defendant leave to appear and defend.

*Horn* now moved to rescind that order on the ground that it had been obtained by fraud, and on a false affidavit that there had been no consideration for the bill.—Though no appeal is expressly given by the Act the Court has power to rescind the order by virtue of its general jurisdiction: *Graham v. Sandrinelli* (*a*). [*Bramwell*, B.—If the facts warrant our interference you are entitled to a rule to shew cause. Both my brother *Martin* and myself have been in the habit at Chambers of setting aside orders of this kind where they have been obtained fraudulently.]—He was then heard upon the merits.

Where a defendant has obtained leave to appear and defend an action brought under The Bills of Exchange Act, 18 & 19 Vict. c. 67, the Court will interfere to set aside such order if obtained fraudulently.

MARTIN, B.—We think that you are not entitled to a

(*a*) 16 M. & W. 191.

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rule. We have always acted upon the principle that where a Judge has made an order for the defendant to be at liberty to appear, it will not be set aside, unless the case be clear. If it were otherwise the act might lead to great abuses.

POLLOCK, C. B., and BRAMWELL, B., concurred.

Rule refused.

JAN. 16.

BARNES v. HAYWARD.

An action was referred to arbitration, the costs of the arbitration and award to abide the event. The arbitrators awarded in favour of the plaintiff, who, in order to take up the award, paid their charges which were exorbitant. The Master, on taxation of the plaintiff's costs, refused to allow the full charge paid by the plaintiff.—
Held, that the excessive charge was properly disallowed.

THIS action was referred to two civil engineers, the costs of the action and of the arbitration and award to abide the event. The arbitrators awarded that the defendant was indebted to the plaintiff in the sum of 108*l*. The plaintiff, in order to take up the award, paid the arbitrators' charges amounting to 436*l*. 0*s*. 9*d*. The plaintiff's costs were taxed by the Master who, on such taxation, refused to allow the expences of the arbitrators paid by the plaintiff. It appeared that the arbitrators held fifteen meetings, sitting for periods varying from one hour to five hours; the total number of hours during which they were employed amounting to fifty-two hours and a quarter. Although the taxation was adjourned for that purpose, the arbitrators did not furnish any information to the Master respecting their fees; nor did they attend before the Master and defend their charge. Ultimately the Master allowed eleven double meetings at ten guineas for each arbitrator, and four single meetings at five guineas each arbitrator; also ten guineas to each arbitrator for perusing the evidence, five guineas for the award, and an extra five guineas to cover any other trouble or expence, making together 304*l*. 10*s*. It was sworn that 304*l*. 10*s*. was considerably more than would have been charged by two barristers under similar circumstances.

Needham, in last Trinity Term (June 7), moved for a rule, calling on the defendant to shew cause why the Master should not review his taxation; and why he should not allow to the plaintiff the amount paid by him to the arbitrators.—The plaintiff had no means of getting the award except by payment of the arbitrators' charges; he ought therefore to be allowed to recover them from the defendant. If the defendant considers the charges excessive, it will be competent for him, when he has been compelled by the award to pay them, to take steps to recover the amount from the arbitrators.

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POLLOCK, C. B.—The plaintiff should not have paid an exorbitant demand. His remedy is to sue the arbitrators to recover back the amount of the overcharge; *Fernley v. Branson* (*a*) is an authority that he may do so in an action for money had and received. The Master acted rightly in disallowing these exorbitant charges on the taxation. In *Re Coombs* (*b*) we held that an arbitrator has no power to fix his own fees, unless the submission gives him that power specifically.

MARTIN, B., and BRAMWELL, B., concurred.

Rule refused.

Prentice had obtained a cross-rule calling on the plaintiff to shew cause why the Master should not review his taxation, on the ground that the sum allowed was too large, being larger than would have been allowed for two barristers, against which *Needham* shewed cause (Nov. 21). The Court having taken time to consider, and on consulting the Master, now made this rule absolute.

(*a*) 20 L. J. Q. B. 178.

(*b*) 4 Exch. 839.

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Jan. 15.

DAVISON and Others v. GENT.

Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law. *Dubitative, Bramwell, B.*

Lands belonging to a Dean and Chapter were usually leased for 21 years, and the leases renewed every seventh year for a further period of 21 years. It was proved to be the practice on the renewal of a lease to return the old lease to the office, when it was destroyed. If the person delivering up the existing lease was not the same person to whom it was granted, the officer of the Dean and Chapter made inquiry as to the manner in which such person became interested in the premises, and on being satisfied of his interest, granted the renewed lease to him. W. in 1849, being in possession of certain lands leased to S. for 21 years from 1842, produced the lease of S. to the officer of the Dean and Chapter which was then cancelled. He obtained a new lease in his own name and continued to occupy and pay rent till his death in 1856; after which his executrix delivered up the lease of 1849, and obtained a renewed lease in her own name.—*Held*, that the facts were evidence of the assent of S. to the grant of the lease of 1849 to W. by the Dean and Chapter.

In ejectment against a person who has entered forcibly without any title, evidence of prior possession is sufficient to entitle the plaintiff to recover; and the plaintiff does not lose his right to insist on such possession by setting up a title which he fails to establish in proof.

renewed lease for twenty-one years from the Dean and Chapter of Durham on the 1st of February, 1856. On the 12th of February, Robinson quitted the house and Garth. The defendant Gent then entered by force, and remained in possession of the house and Garth. On the 16th of the same month Elizabeth Wood married the plaintiff Arthur Coates. Coates then let all the premises to the plaintiff Davison, who entered and took possession of Mire Flat and Firth, Robinson having previously given up possession. The defendant then entered and forcibly turned Davison and his cattle out of possession of Mire Flat and Firth. For many years rent had been paid under the leases to the Dean and Chapter of Durham by Joseph Wood and his widow. It appeared, however, that in the year 1842 the Dean and Chapter had granted a lease of the property in question to Sherwood for twenty-one years, from the 15th of November, 1841. The counterpart of this lease was produced by the secretary to the Dean and Chapter of Durham, as well as the counterpart of the lease granted to Joseph Wood in 1849. It was proved that the leases were renewed every seven years for a fresh term of twenty-one years. When a renewal took place, the practice was to deliver the old lease to the office; the seal of it was then torn off, and the lease destroyed, the Dean and Chapter retaining their own counterpart. If the person delivering up the existing lease was not the person to whom it was granted, the officer of the Dean and Chapter made inquiry as to the manner in which such person became interested in the premises demised, and on being satisfied of his interest, granted the renewed lease to him.

The defendant's counsel objected that there was no evidence to go to the jury that the lease to Sherwood had been surrendered in point of fact, and that the facts did not amount to a surrender by operation of law. The

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learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the Court should be of opinion that there was no evidence to go to the jury.

*Manisty* having obtained a rule nisi accordingly,

*Hugh Hill* and *Addison* now shewed cause.—If it appears that the new lease was granted by the Dean and Chapter with the assent of the prior lessee, that is evidence of a surrender by him. Here Wood could not have been possessed of the lease of 1842 unless it had been transferred by Sherwood to him. No one interfered with Wood's possession under his lease till 1856, when the defendant, who was a mere wrongdoer, took possession. In *Lyon v. Reed* (*a*) the new lease was a lease of a reversion; there had been no possession or enjoyment in conformity with the new lease, and it did not appear that any notorious act had been done shewing that a change of ownership had taken place. In this case the possession was according to the new lease, and no one objected to what was done. The Court, in *Lyon v. Reed* (*a*), guard themselves against overruling *Thomas v. Cook* (*b*). In *Nickells v. Atherstone* (*c*) Lord Denman, in delivering the judgment of the Court, said: “Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence.” The facts in *Lyon v. Reed* (*a*) lead to the conclusion that the lessees under the prior lease knew nothing of the subsequent lease, and therefore could not be

(*a*) 13 M. & W. 285.

(*b*) 2 B. & Ald. 119.

(*c*) 10 Q. B. 944.

presumed to have surrendered their interest. There was here a change of possession (*a*). If the facts do not amount to evidence of a surrender by operation of law, there is at least evidence of an assignment of the lease by Sherwood to Wood. For that purpose, before the 8 & 9 Vict. c. 106, s. 3, nothing more was necessary than a note in writing, which may have been lost. Wood being in possession of the land and the lease, obtained a new lease from the Dean and Chapter. If Sherwood had any right, he would have claimed a new lease at the usual period for the renewal. He did not do so: the presumption therefore is, that his interest had passed to Wood (*b*). In Sheppard's Touchstone, 301, it is said that it is a surrender, if the new lease be to the lessee and a stranger (*c*). There is no reason why the same rule should not apply where the grant is to the stranger alone, with the assent of the lessee. If the lessee writes to the lessor and induces him to grant and a tenant to accept a lease, the lessor is estopped, and the new lessee is bound to fulfil the obligations incident to the demise. [Pollock, C. B.—We do not mean to disturb the decision in *Thomas v. Cook* (*d*). In *Nickells v. Atherstone* (*e*) the Court of Queen's Bench did not adopt the view that that case was overruled by *Lyon v. Reed* (*f*), and if the decision is to be questioned now, it must be in a Court of Error. To say the least, the rule there laid down is extremely convenient. It was acted upon in *M'Donnell v. Pope* (*g*), and *Lessee Lynch v. Lynch* (*h*).] Here there was an assent by the former lessee to the granting of the new lease, and the possession was in

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(*a*) They referred on this point to Smith's Leading Cases, vol. 2, p. 662, 4th Edition.

(*d*) 2 B. & Ald. 119.  
(*e*) 10 Q. B. 944.

(*b*) See *Doe d. Courtail v. Thomas*, 9 B. & C. 288.

(*f*) 13 M. & W. 285.

(*c*) See also *Hanerton v. Stead*,

(*g*) 9 Hare, 705.  
(*h*) 6 Irish Law Rep. 131.

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accordance with the lease so granted. The circumstance of the lease being found in the possession of Wood and given up by him to be cancelled, is evidence of the assent of Sherwood that the new lease should be granted to Wood. [Bramwell, B.—Is there any evidence that Sherwood knew of the surrender?] The Court in *Lyon v. Reed* (*a*) admitted that the delivery up of the old lease was cogent evidence that the lessees under it had consented to the making of the new lease; and *Walker v. Richardson* (*b*) is an authority to the same effect. [Bramwell, B.—That case was doubted in *Lyon v. Reed* (*a*).]—Secondly, as against this defendant, evidence of possession at the time of his forcible entry is sufficient to entitle the plaintiffs to recover. The defendant is a mere trespasser, and cannot, by taking possession forcibly, put the plaintiffs to the necessity of proving their title. *Allen v. Rivington* (*c*), *Doe d. Hughes v. Dyeball* (*d*). [Bramwell, B.—The defendant seems to be in this dilemma:—either his entry was altogether tortious, or he came in under Robinson the tenant, and is therefore estopped from denying the plaintiffs' title.]

*Manisty*, in support of the rule.—At the trial the plaintiffs did not rely on mere possession; they set up title and must stand or fall with the title they have set up. It must be admitted that if Sherwood would have been estopped, the defendant is so. But nothing more is proved than that the lease was found in the possession of the Dean and Chapter. It does not appear that the tenant under the old lease knew anything of the grant of the new lease. [Pollock, C. B.—The proper custody of a lease is in the lessee. If an old lease is given up to the lessor and

- (a) 13 M. & W. 285. See p. 307. (c) 2 Saund. 111.  
 (b) 2 M. & W. 882. (d) Moo. & M. 346.

a new lease is granted, that is evidence that the old lease was given up in order that a new one might be granted. The new lessee must have paid the fine.] A deed cannot be destroyed by mere inference. The Court in *Lyon v. Reed* (*a*) point out the uncertainty and mischievous consequences to the security of titles, which would result from adopting such a doctrine. [Pollock C. B.—I set against that the decision in *Walker v. Richardson* (*b*).] The defendant is entitled to rely on the defect of title which appears upon the plaintiffs' evidence. Outstanding terms are constantly set up by defendants. [Bramwell, B.—Not by defendants who have obtained possession by forcibly evicting the plaintiffs.]

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POLLOCK, C. B.—I am of opinion that this rule must be discharged. We have already intimated our determination not to disturb the decision in *Thomas v. Cook* (*c*). In the year 1837 that case was referred to by Parke, B., in *Walker v. Richardson* (*b*), as a recognised authority. It is a decision very convenient in practice. In *Nickells v. Atherstone* (*d*), the Court of Queen's Bench, after the decision of *Lyon v. Reed* (*a*), in which doubt was thrown on *Thomas v. Cook*, said that they did not assent to the observations in that case on the decision in *Thomas v. Cook*. It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law. In *Nickells v. Atherstone*, the landlord who had let the premises to a new tenant, and put him in possession with the consent of the defendant, the former tenant, sought to make the defendant liable for the rent: *Lord Denman's* reasoning is unanswerable, and it applies to the present

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| ( <i>a</i> ) 13 M. & W. 285.  | ( <i>b</i> ) 2 M. & W. 882. |
| ( <i>c</i> ) 2 B. & Ald. 119. | ( <i>d</i> ) 10 Q. B. 944.  |

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case. He says, "As far as the plaintiff is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter." Here the tenant gave up the possession, together with the deed enabling the occupier to get a new lease to himself. The only question, therefore, is whether these facts are evidence of the assent of the tenant under the old lease to the grant of the new lease. It was argued that Sherwood, the tenant under the old lease, knew nothing of the new grant, and that it did not appear that he ever had his lease. According to the ordinary course of business he must have had his own lease. He had both the property and possession; he must have given up the old lease with the possession for the purpose of enabling the person to whom he gave them up to get a new lease. As to the second point, a plaintiff in ejectment is not deprived of the right to rely on his prior possession, as against a mere wrongdoer, because he has brought forward documents which if complete might make out a perfect title, but which on account of some defect in proof, do not establish his title to the property in question.

BRAMWELL, B.—On the first point I have entertained considerable doubt, but am not prepared to dissent from the rest of the Court. On the second point it is clear that the plaintiffs are entitled to recover. It was scarcely disputed on the part of the defendant that he either entered tortiously or came in under Robinson. In

either case the plaintiffs would be entitled to a verdict on proof of those facts alone. But it is said that the plaintiffs have shewn a title which is imperfect. If it appeared that the plaintiffs had been wrongfully in possession, it may be that they could not rely on mere possession as against the defendant. But it does not follow that the plaintiffs were wrongfully in possession because they failed to shew that they had a perfectly valid title. Possibly, if Sherwood had been defendant, the plaintiffs might have had no title as against him. But that would not deprive them of their right to rely on their prior possession, as against the defendant, who was a mere intruder.

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WATSON, B.—I am also of opinion that this rule must be discharged. On the first point it is clear that where a fresh lease is granted to the tenant under a former lease, that is a surrender of the former lease by operation of law. *Thomas v. Cook* went a step further: it was there held that a lease, by the assent of a prior lessee, to a stranger, was a surrender of the former lease by operation of law. That case was questioned in *Lyon v. Reed*, but upheld in *Nickells v. Atherstone* and many other cases, and has been constantly acted upon in practice for forty years; the only question therefore is, whether there was evidence to go to the jury of the assent of Sherwood to the grant of the fresh lease to Wood. Wood was in possession both before and after the renewal of the lease in 1849. In 1856 the lease was again renewed by his widow and executrix, who was at that time in possession, and on each occasion the old leases were given up and cancelled. There was therefore cogent evidence of the assent of Sherwood to the grant of the new lease. If he did not assent, it cannot be supposed that he would not have taken some steps to assert his right. On the other point, the plaintiffs proved their title by shew-

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ing a lease and possession under it; that Robinson was the tenant, and that his interest had expired. The present defendant, a person coming in without a title, producing leases with seals torn off, but not shewing any connection between himself and the lessees under these leases, does not answer that case. Mr. *Manisty's* contention that, having set up a title, the plaintiffs cannot rely on mere possession as against the defendant, is not well founded.

Rule discharged.

Jan. 30.

STEVENS v. RUSSELL.

A plaintiff who has filed an affidavit of debt against the defendant in the Court of Bankruptcy, without any reasonable or probable cause, cannot be deprived of his costs under 12 & 13 Vict. c. 106, s. 86, when before trial the action is referred to the award of an arbitrator.

THIS was an application for a rule to shew cause why the plaintiff should not pay the defendant's costs of the action notwithstanding the sum of 4*l*. 15*s*. 7*d*. was awarded to the plaintiff.

On the 31st of May, 1856, the plaintiff caused to be served on the defendant, a trader, a notice and demand in bankruptcy; and on the 2nd of June he filed an affidavit in the Court of Bankruptcy that the defendant was indebted to him in 51*l*. 4*s*. 1*d*., in the form in Schedule (F) of the Bankrupt Law Consolidation Act, 1849. The defendant having been served with a summons requiring him to appear before the Court of Bankruptcy to ascertain whether he admitted the demand or not, at the return of the summons appeared and deposed that he believed that he had a good defence on the merits. The plaintiff then commenced an action against the defendant to recover the alleged debt. After issue joined the cause was referred to the award of an arbitrator, the costs of the reference and award to be in the arbitrator's discretion. The arbitrator, by his award,

found that 4l. 15s. 7d. only was due to the plaintiff. The defendant's attorney, who had conducted the proceedings in the reference, stated in his affidavit circumstances shewing that the plaintiff had no reasonable or probable cause for making an affidavit of debt for the larger sum.

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Baddeley now moved accordingly.—The 12 & 13 Vict. c. 106, s. 86, enacts, “that in any action brought after the commencement of this Act, wherein any such creditor is plaintiff, and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed, &c., provided that it shall be made appear to the satisfaction of the Court in which such action is brought, &c., that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such Court shall thereupon by rule or order direct that such costs shall be allowed to the defendant.” *Deere v. Kirkhouse* (*a*) is an authority that if a verdict had been taken at Nisi Prius, subject to the certificate of an arbitrator, and the arbitrator afterwards certified for a less sum than that mentioned in the affidavit, the statute would apply. In *Higginson v. Broadhurst* (*b*) the question whether the statute applied to cases referred to the award of an arbitrator was raised, but not determined. In Gray on Costs, p. 240, it is said that this section applies to cases referred to arbitration. In *Robinson v. Elsam* (*c*) an attorney having brought an action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for doing so, it was held that the

(a) 1 L. M. & P. 783.

(b) 1 D. & L. 490.

(c) 5 B. & Ald. 661.

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case was within the 43 Geo. 3, c. 46, s. 3. The plaintiff has *not recovered* the amount for which he has made his affidavit; and such non-recovery is the only thing necessary to give the Court jurisdiction to make the order now asked for. *Keene v. Deeble* (*a*) is distinguishable on two grounds: first, not only the cause, but all matters in difference were referred; and, secondly, a distinction was made between the case of an award and a recovery by verdict, because in the former case the defendant might have been examined, but not in the latter, which it was assumed might have made a difference in the finding. At the present time an action is on the same footing as an arbitration with respect to the admissibility of the defendant's evidence. That case occurred under the 43 Geo. 3, c. 46, s. 3, and the Court are not bound by it in construing the Act now in question.

POLLOCK, C. B.—We think that we are bound by the decision of the Court in the case of *Keene v. Deeble* (*a*), that case having been decided subsequently to the case of *Robinson v. Elsam*. The words of the 86th section of the Bankrupt Law Consolidation Act being similar to those of the 43 Geo. 3, c. 46, s. 3, must receive a similar construction. There will therefore be no rule.

MARTIN, B.—I am of the same opinion. It is evident that the Legislature, in passing the latter statute, took as a model the words of the earlier Act. If we were to put a construction upon the later Act different from that which the Courts have put upon the same words in the earlier Act, we should contravene the intentions of the Legislature.

WATSON, B.—I am of the same opinion. It was well settled under 46 Geo. 3, that the word "recover" meant

recover by verdict, and that there was a distinction between cases where there was a reference and those where a verdict was taken subject to a reference. In *Robinson v. Elsam*, an attorney's demand was referred to the Master, and the true explanation of the case is that the order was made by the Court by virtue of its jurisdiction over its own officer.

Rule refused (a).

(a) The following case occurred in Trinity Term, June 12, 1856:—

Foster v. Hanson.

HUGH HILL had obtained a rule calling on the plaintiff to shew cause why the defendant should not be entitled to his costs of the action, to be taxed under the 12 & 13 Vict. c. 106, s. 86, the plaintiff not having recovered the full amount of the sum for which he had filed an affidavit of debt pursuant to that statute.

The plaintiff had served on the defendant, who was a trader subject to the bankrupt laws, a notice requiring immediate payment, claiming by his particulars, which consisted of a great number of items, the sum of 339*l. 9s. 10d.* An affidavit of debt, in the form specified in schedule (F.), was filed by the plaintiff in the Court of Bankruptcy for the Birmingham district. A summons was then served calling on the defendant to appear in the said Court. The defendant having appeared filed an admission that he was indebted to the plaintiff in 34*l. 5s. 8d.*, and swore that he believed he had a good defence on the merits to 30*l. 4s. 2d.* An order was then made that the defendant should enter into a bond with two sureties in the penal sum of 610*l. 8s. 4d.*, in the form provided by the Act. The defendant being unable to procure sureties to the bond, negotiations took place between the plaintiff and the defendant as to dispensing with the bond. An agreement was entered into between the plaintiff, the defendant and one Knight, by

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The creditor of a trader having in pursuance of the Bankrupt Law Consolidation Act, 1849, filed an affidavit of debt, and the amount having been disputed, an order was made that defendant should enter into a bond with two sureties. An action was then brought to recover the amount claimed. An agreement was then entered into between the plaintiff, the defendant and one K., in pursuance of which the order

for the bond was discharged, and the bankruptcy proceedings were terminated, K. depositing checks for the debts and costs, if any recovered in the action: in case of a verdict for the defendant the checks to be returned to K., upon his paying 6*l.* for the costs of the trader debtor summons, and also the costs of any issue found for the plaintiff. At the trial of the cause it was agreed that a verdict should be entered for the plaintiff, subject to the award of an arbitrator, the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced so that the creditor recovered a sum less than that sworn to.—*Hold*, first that the defendant's right to costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, was not affected by the agreement or the termination of the bankruptcy proceedings in pursuance of it. Secondly, that as the verdict was to be operative the statute applied, notwithstanding that the cause has been referred to the award of an arbitrator.

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which it was stipulated that the bankruptcy proceedings should be discontinued, and the order for the bond discharged: that 116*l.* 5*s.* due for rent should be excluded, and that the plaintiff should be left to his remedies to recover it: that 34*l.* 5*s.* 8*d.* should be paid at once, and that Knight should give his check for 191*l.* 17*s.* 6*d.*, the residue of the money claimed, to one Reece, to satisfy the debt that might be recovered by the plaintiff against the defendant; and a further check for 26*l.*, to be applied so far as it extended towards the payment of the sum of 6*l.* for the costs of the trader debtor's summons, and the residue thereof to the costs, if any, to be recovered by the plaintiff in the action. In case of a verdict for the defendant, Reece was to return the checks upon receiving 6*l.* for the bankruptcy costs, and also the costs of any issue found for the plaintiff. The checks were handed by Knight to Reece. On the 14th March an order of the Court of Bankruptcy was made by consent that the proceedings under the trader debtor summons should be discontinued; and the costs of the summons were fixed at 6*l.* and ordered to be paid by the defendant. An action having been commenced the defendant pleaded, amongst other pleas, set-off, and the cause having come on for trial, it was agreed that the jury should find a verdict for the plaintiff, subject to the award of an arbitrator to whom the cause was referred, "the costs of the cause to abide the event and determination of the award, and the costs of the reference and award to be in the discretion of the arbitrator." The arbitrator awarded that the verdict should be reduced to the sum of 103*l.* 6*s.* 7*d.*

*Bovill* and *Baylis* now shew cause.—The mere fact that an arbitrator has awarded something less than the whole sum claimed does not shew that the plaintiff had not reasonable or probable cause for making the affidavit of debt. That was not a matter in dispute before the arbitrator; *Sherwood v. Taylor* (*a*). [Hugh Hill referred to *Tipton v. Gardner* (*b*) and *Ballantyne v. Taylor* (*c*).] Secondly, the statute does not apply when there is a reference, and the arbitrator makes an award: the money awarded is not recovered within the meaning of the 86th section of the Bankrupt Law Consolidation Act. The point arose, but was not decided in *Higginson v. Broadhurst* (*d*). [Pollock, C. B.—Here the verdict was to be operative.] Thirdly, the right to this money arises out of the proceedings in bankruptcy. The bankruptcy proceedings were terminated by the order of the 14th

(*a*) 6 Bing. 280. See *Gilbert v. Crosier*, 1 C. B. N. S. (*b*) 4 A. & E. 317.

(*c*) 5 A. & E. 792. (*d*) 1 D. & L. 490. See *Deere v. Kirkhouse*, 1 L. M. & P. 783.

of March, in consequence of the arrangement with Knight and the defendant. The affidavit therefore became mere waste paper. Fourthly, the agreement put an end to the right of the defendant to ask for these costs. The last clause in it expressly provides that the plaintiff shall receive the costs of any issue found for him. [*Bramwell, B.*—In order to release the plaintiff from the penalty we should have to add either to the statute or to the agreement. The tacit provision that the defendant should get his costs, if he should be entitled to them under the 86th section of the Bankrupt Law Consolidation Act, 1849, is quite consistent with the stipulation on which the plaintiff relies.]

*Hugh Hill*, who appeared in support of the rule, was not called on. The rule was enlarged at Chambers to enable the arbitrator to attend before *Bramwell, B.*, and ultimately made absolute.

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#### MEMORANDUM.

In the present Term the Honourable Sir *Edward Hall Alderson*, Knight, one of the Judges of this Court, died. He was succeeded by *William Fry Channell*, one of Her Majesty's Serjeants-at-law, who afterwards received the honour of Knighthood.

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## HILARY VACATION, 20 VICT.

Feb. 7.

HILL v. MERRITT.

Plaintiff filed an affidavit of debt in the Court of Bankruptcy in which he swore that the defendant was indebted to him in the sum of 4263*l.* 1*s.* 3*d.* This sum included an item of 129*l.* 1*s.* 4*d.* for salary, at the rate of 500*l.* a year. Of this sum 1000*l.* was barred by the Statute of Limitations. No acknowledgment or promise to bar the statute, or payment on account, had been made, and in fact the plaintiff had

*HUGH HILL* and *Mihward* shewed cause (*a*) against a rule calling on the plaintiff to pay to the defendant, a trader liable to the bankrupt laws his costs of suit upon the ground that the plaintiff had not recovered the full amount for which he had filed an affidavit of debt in the Court of Bankruptcy, the plaintiff not having had any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid.

*Manisty* and *Hannen* were heard in support of the rule.

*Cur. adv. vult.*

The facts and arguments are sufficiently set forth in the judgment which was now delivered by

*MARTIN, B.*—This is a rule calling upon the plaintiff to never claimed any part of this sum of 129*l.* 1*s.* 4*d.*, before commencing the proceedings in bankruptcy. An action having been brought, the defendant denied his liability to pay the sum, but did not plead the Statute of Limitations. The cause having come on for trial, a verdict was taken subject to a reference. The arbitrator awarded to the plaintiff the sum of 3176*l.* 2*s.* 2*d.* which included 203*l.* 1*s.* 3*d.*, which, when before the arbitrator, the parties agreed should be paid in respect of the claim for 129*l.* 1*s.* 4*d.* The plaintiff alleged that this was a compromise; the defendant, that he agreed to pay it as the price of peace, having always denied his liability to pay any part of that claim.—*Held*, that the case must be judged of by the state of things existing when the affidavit was made, and that as there had been no payment on account, or acknowledgment, written or verbal, to bar the statute, or lead to the inference that the defendant would waive it, there was no reasonable or probable cause for making an affidavit that the sum of 1000*l.*, barred by the statute, was due; and that the defendant was therefore entitled to his costs of the action by stat. 12 & 13 Vict. c. 106, s. 86.

(*a*) Jan. 31. Before *Martin, B.*, sitting alone.

shew cause why the defendant should not be entitled to his costs under the 86th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. By this section it is enacted, that if a plaintiff who shall have filed an affidavit of debt in order to make the defendant a bankrupt, shall not recover the full amount of the sum for which he shall have filed the affidavit, the defendant shall be entitled to his costs, provided it shall be made to appear to the Court that the plaintiff had not any reasonable or probable cause for making the affidavit of debt to such amount. The present action was commenced on the 22nd of January, 1855, and on the 24th the plaintiff made an affidavit of debt in the Court of Bankruptcy to the amount of 4263*l.* 16*s.* 3*d.* The cause was called on for trial at the last Liverpool Assizes, and a verdict taken for the plaintiff subject to a reference. An award was made in favour of the plaintiff. The sum awarded, together with the sum of 676*l.* 2*s.* 2*d.* paid into Court, amounted to 3176*l.* 2*s.* 2*d.*, and in this was included a sum of 203*l.* 19*s.* 3*d.* stated by the plaintiff to be accepted as a mere compromise in respect of a claim of 1291*l.* 13*s.* 4*d.*, and by the defendant as the price of peace, he denying all liability in respect of it. The present question arises in respect of this sum of 1291*l.* 13*s.* 4*d.* The amount of 4263*l.* 16*s.* 3*d.* was made up of several items set forth in the particulars of demand annexed to the affidavit in bankruptcy, and included the 1291*l.* 13*s.* 4*d.* thus described:—"For salary as per agreement for managing the making of the Crewe and Sandbach branch of the North Staffordshire Railway from October the 1st, 1846, to May 1st, 1849, being two years and seven months, at the rate of 500*l.* per annum. Upon this statement therefore, 500*l.*, a portion of this sum, became due on the 1st of October, 1847, and another 500*l.*, other portion, on the 1st of October, 1848. So that 1000*l.*, part of the sum of 1291*l.* 13*s.* 4*d.*, was barred by the Statute of Limitations.

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If I were compelled to decide this case upon the disputed facts contained in the affidavits, I should have had very great difficulty. The plaintiff's affidavit states, in the most positive terms, the agreement for the payment of the 500*l.* per annum; but there is this very extraordinary circumstance, that from May, 1849, to January, 1855 (an interval of nearly six years), neither by word, nor in writing, was any claim ever made by the plaintiff for payment, nor any recognition by the defendant of the debt, and upon the plaintiff's own affidavit the first notice the defendant had of the claim was in the particulars of demand annexed to the affidavit in the Court of Bankruptcy. There is therefore no pretence for saying that there has been any payment or acknowledgment to take this item to the extent of 1000*l.* out of the Statute of Limitations, or indeed any acknowledgment or recognition of it at all. Upon the other hand, the affidavit of the defendant is by no means so precise and particular as that of the plaintiff; and looking at the circumstance, that, by his own acknowledgment at the arbitration, he was indebted to the plaintiff in a sum of 2295*l.*, beyond what he swore was the true debt in the Court of Bankruptcy, I should feel myself constrained to look with jealousy and act with very great caution upon any affidavit made by him. But it seems to me that the rule must be decided upon the plaintiff's own statement. He has made an affidavit of debt in the Court of Bankruptcy to an amount of which 1000*l.* is by his own shewing barred by the Statute of Limitations, and there is nothing whatever to shew that there is any colour for supposing that its operation is barred. How can I then possibly say that he had reasonable and probable cause for making an affidavit of debt to an amount including this sum? If there had been any payment even apparently on account, or a written, or even verbal acknowledgment of any kind, there might have been some colour for stating that the debt still continued

or that the statute might be waived; but there is nothing of the sort, and the plaintiff does not even state that the defendant had any notice of the claim until the time when the affidavit was made, although he states several reasons to excuse or explain the circumstance why he had not brought it forward before. If the 1000*l.* had been the only sum deposited to in the affidavit, no one, I apprehend, could imagine for a moment that there was any reasonable or probable cause for making it, and subjecting the defendant to the very serious consequences resulting therefrom; and in my opinion the section has the same operation, whether the groundless claim be the sole debt or only part of the debt deposited to. It therefore seems to me that upon this undisputed fact the defendant is entitled to have this rule made absolute. There is a case, *White v. Prickett* (*a*), where the plaintiff was held to be entitled to his costs, under the statute 43 Geo. 3, c. 46, notwithstanding a part of his claim was barred by the Statute of Limitations; but it seems to me that the judgment of the learned Judges in that case, and the reasons they give, confirm the view I have taken in the present case, where there was no colour whatever for supposing, when the affidavit was made, that the defendant would abandon any defence which the law afforded him. It is true the defendant did not plead the Statute of Limitations; but in my opinion the case must be judged of by the state of things existing when the affidavit was made.

It was argued, that inasmuch as when the defendant admitted before the arbitrator that there was due to the plaintiff the very large sum of 2296*l.* 0*s.* 9*d.* beyond what he had sworn was the true debt in the Court of Bankruptcy, and consented to pay 203*l.* 19*s.* 3*d.* as against this item, he thereby admitted that he was liable to it. I think, however, I must take the whole of the admission together, and

(*a*) 4 Bing. N. C. 237.

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it was accompanied by an express denial of liability and a reservation of the right to proceed upon the above section of the statute. It was also said that the submission of the case to arbitration prevented the operation of the section, and the cases of *Keene v. Deeble* (*a*) and *Linthwaite v. Bellings* (*b*) were cited. I think, however, this is not so, and that these cases do not apply. A great variety of cases upon the statute 43 Geo. 3, c. 46, the very terms of which are copied in the 86th section, are contrary to this view; and even if they had not existed, I should have thought the stipulation in the order of reference that the costs were to abide the event, meant the legal event, that is the event which the law prescribes.

Rule absolute.

(*a*) 3 B. & C. 491.

(*b*) 2 Smith, 667.

Feb. 11.

#### MATHEW v. BLACKMORE.

L. devised certain lands to the defendant on trust to sell the same and apply the proceeds in payment of debts, &c. The defendant mortgaged the lands to the plaintiff as a security for money lent to him. The

mortgage deed contained a covenant by the defendant that he would, out of the monies which should come to his hands as such trustee, from the lands comprised in the mortgaged security and the personal estate (if any) of L., pay to the plaintiff the principal and interest.—*Held*, that as there was an express covenant by the defendant to pay in a qualified manner, no contract by parol could be implied for the repayment, and consequently an action for money lent would not lie.

#### DECLARATION for money lent.—Plea: Never indebted.

At the trial before *Martin*, B., at the London sittings in Michaelmas Term, it appeared that the action was brought to recover the sum of 200*l.* lent by the plaintiff to the defendant on mortgage of certain lands. It was admitted that the 200*l.* was lent, and that all interest had been paid up to the time of action brought; and the only evidence

was the indenture of mortgage of which the material parts are as follows:—

This indenture made the 19th September, 1843, between the defendant of the one part and the plaintiff of the other part: reciting that by indentures of lease and release dated the 20th and 21st June, 1830, T. Leman mortgaged to E. Studley certain lands in Devonshire as a security for 700*l.* and interest: also reciting that by indenture dated the 16th February, 1835, T. Leman charged the same lands with the further sum of 530*l.* lent to him by E. Studley, and interest thereon: also reciting that T. Leman died on the 1st May, 1837, having by his will devised unto R. Blackmore (the defendant), J. Goodland and J. Studley, their heirs and assigns (amongst others), the lands comprised in the recited securities; upon trust that they should, as soon as conveniently might be after his decease, absolutely sell and dispose of, assign and convey the said lands for the best price that could be obtained for the same; and apply such purchase money in paying all his debts, whether on mortgage, bond, note, or simple contract, and expenses of the trust, &c., and place out the residue on land or government security upon the trusts therein mentioned: also reciting that at the time of the death of T. Leman there were due to E. Studley the two principal sums of 700*l.* and 530*l.*, making together the aggregate principal sum of 1230*l.*; and also an arrear of interest amounting to 85*l.* 18*s.* 5*d.*: also reciting that J. Goodland and J. Studley disclaimed all estates, interest, &c., under the will of T. Leman: also reciting that by statutory indenture of release, dated the 18th September then last past, and made between E. Studley of the first part, J. Honiball of the second part, R. Blackmore (the defendant) of the third part, J. Mathew (the plaintiff) of the fourth part, and H. Gervis of the fifth part: in consideration of 1372*l.* to E. Studley paid by J. Mathew,

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being the amount of the said principal sum of 1230*l.*, and 142*l.* for interest then due thereon, E. Studley assigned to J. Mathew the said principal and interest monies for his own use: and J. Studley also released and conveyed unto J. Mathew, his heirs and assigns, the said mortgaged lands, to hold the same unto and to the use of J. Mathew, his heirs and assigns for ever, subject to such right of redemption as was then subsisting under the said recited mortgage securities: also reciting that no sale of the said hereditaments, premises, or any part thereof, had been effected either under the said recited mortgage securities or under the trusts of the will of T. Leman: also reciting that the principal sum of 1230*l.* and interest was then due to J. Mathew: also reciting that R. Blackmore, not being able to effect an immediate and absolute sale of the said hereditaments, and premises, and having immediate occasion for the sum of 200*l.* for the purpose of paying off a portion of the debts of T. Leman, had applied to and requested J. Mathew to advance that sum to him upon the security of the said hereditaments and premises, which J. Mathew had agreed to do, on having the same, with interest, secured to him by those presents: It was witnessed, that in consideration of the sum of 200*l.* to R. Blackmore paid by J. Mathew, &c., R. Blackmore did thereby subject and charge and make liable the said hereditaments and premises, to and with payment to J. Mathew of the said sum of 200*l.*, so now advanced and lent, together with interest for the same at the rate of 4*l.* 10*s.* per annum. "And he the said R. Blackmore, for himself, his heirs, executors, and administrators, as such trustee as aforesaid, doth hereby covenant and declare with and to the said J. Mathew, his heirs, &c., that the said lands, hereditaments, and premises, shall not be redeemed or redeemable until payment to the said J. Mathew, his executors, &c., not only of the said

principal, interest, and all other monies now due or secured to him by the hereinbefore recited indenture, but also of the said sum of 200*l.*, now lent and advanced as aforesaid, and interest for the same at the rate hereinbefore mentioned. And further, that in case the said lands, hereditaments, and premises, comprised in the hereinbefore mentioned securities, shall be sold by the said J. Mathew, his heirs, &c., under or by virtue of the hereinbefore recited securities, or either of them, so transferred to him, it shall be lawful for the said J. Mathew, his executors, &c., to retain the said sum of 200*l.* now advanced, together with all interest which for the time being may be due in respect thereof as well as the said principal, interest, and other monies secured by the said recited securities. And further that he, the said R. Blackmore, his heirs, &c., shall and will out of the money which shall come to his hands, as such trustee as aforesaid, from all and singular the lands, hereditaments, and premises, comprised in the said recited securities or the personal estate (if any) of the said T. Leman, pay or cause to be paid unto the said J. Mathew, his executors, &c., the said principal and interest and other money secured by the said hereinbefore recited indenture, and every of them, as also the principal and interest money intended to be hereby secured."

It was objected on behalf of the defendant that the action would not lie, and that the defendant was only liable according to the terms of the covenant contained in the mortgage deed. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit.

Hodges, in last Michaelmas Term, obtained a rule nisi accordingly, against which

J.D. Coleridge shewed cause, in Hilary Term (Jan. 29).—

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The action is maintainable. A loan of money creates a duty on the part of the borrower to repay it, and the lender may recover it back under the common count for money lent. The same principle applies in the case of a mortgage, where the mortgage deed contains no covenant, either express or implied, for repayment of the mortgage money: 1 Chit. Cont. 513, 5th ed. In *Yates v. Aston* (*a*), the plaintiff lent the defendant a sum of money on the security of a mortgage, which contained no covenant for repayment of the money, but merely gave the plaintiff the security of the mortgaged premises; and it was held that the loan raised a contract for repayment which was not merged in the mortgaged security. The Court there recognise and adopt the principle of the decision in *Burnett v. Lynch* (*b*). [*Martin, B.*—That case was somewhat qualified in this Court by *Humble v. Langston* (*c*), but was upheld by the Court of Exchequer Chamber in *Walker v. Bartlett* (*d*).] *Baber v. Harris* (*e*), is also an authority that where a mortgage deed contains no express covenant an action will lie on the implied promise to repay the mortgage money. This deed contains no express covenant. The covenant that the land shall not be redeemed or redeemable until payment merely operates to charge the land. The covenant that in case the land is sold by the plaintiff he may retain 200*l.* and interest, &c., is clearly no covenant on the part of the defendant to pay the money. The covenant relied on is, that the defendant will, out of the monies which shall come to his hands as trustee, pay the mortgage money. That is not a covenant to pay absolutely, but only to pay out of the profits of the land, if they are sufficient. There being, therefore, no

(*a*) 4 Q. B. 182.

(*d*) 18 C. B. 845.

(*b*) 5 B. & C. 589.

(*e*) 9 A. & E. 532.

(*c*) 7 M. & W. 517.

express covenant, the receipt of the money created a personal liability on the part of the defendant to repay it, and the deed is evidence of the debt. No doubt, a bond or covenant given to secure an existing debt will operate as a merger of the remedy on the simple contract, irrespectively of the intention of the parties: *Price v. Moulton* (*a*); but where the specialty is merely a collateral security, and the remedy on it is not coextensive with the simple contract remedy, there is no merger: *Holmes v. Bell* (*b*), *Norfolk Railway Company v. Mc Namara* (*c*). Moreover this deed is void. The land was devised to the plaintiff in trust absolutely to sell it, and a trust for sale does not authorize a mortgage: *Haldenby v. Spofforth* (*d*), *Page v. Cooper* (*e*), *Stroughill v. Anstey* (*f*).

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Montague Smith and *Hodges*, in support of the rule.—The right of the plaintiff and liability of the defendant depend on the contract between them; the evidence of that contract is the deed. The plaintiff is a trustee and has therefore expressly guarded against personal liability. He covenants to pay, not absolutely, but in a qualified manner, viz., out of the proceeds of the sale of the land. The contract which the law implies, in the absence of an express covenant, would impose on him a personal liability. The law is thus stated in Chit. Plead., vol. 1, p. 115, 5th ed.:—“When a party has different securities of different descriptions for the same debt or demand, and from the same person, he must found his action on that security which is in law of the higher nature and efficacy. The law has prescribed different forms of action on different

(*a*) 10 C. B. 561.

(*d*) 1 Beav. 390.

(*b*) 3 Man. & G. 213.

(*e*) 16 Beav. 396.

(*c*) 3 Exch. 628.

(*f*) 1 De Gex, M. & G. 635.

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securities. Thus, assumpsit cannot in general be supported when there has been an express contract under seal, which relates to the same subject-matter and is still in force; but the party must proceed in debt or covenant." Here the deed relates to the same subject-matter as the simple contract, and no other obligation can be implied than that expressed in the deed: *Atty v. Parish* (*a*). *Yates v. Aston* is distinguishable, inasmuch as there the mortgage deed contained no express covenant to pay. That case only decides that the circumstance of there being a security on land does not of itself defeat the implied contract which *prima facie* arises from a loan. If in this case the deed had contained no covenant to pay, *Yates v. Aston* would have been in point. *Baber v. Harris* (*b*) shews that where the deed is the foundation of the contract no action would lie on the implied promise to pay. In *Toussaint v. Martinnant* (*c*), *Buller*, J., says,—"Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties." Another principle is, that there cannot co-exist two remedies, one on the simple contract and another on the specialty: *Price v. Moulton* (*d*). [*Pollock*, C. B.—Where there is an express covenant there can be no implied covenant. Suppose, instead of the limitation as to payment out of a particular fund, it was a limitation as to time, for instance, payment at the end of two years, it is clear that the law would not imply a contract to pay sooner.]—With respect to the other point, for aught that appears there may have been a power to mortgage, and

(*a*) 1 New Rep. 104.

(*b*) 9 A. & E. 532.

(*c*) 2 T. R. 100.

(*d*) 10 C. B. 561.

to enter into a covenant to pay out of the testator's estate.

Cur. adv. vult.

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The judgment of the Court was now delivered by

**POLLOCK, C. B.**—This was an action for money lent, to which the plea was “never indebted.” It was tried before my brother *Martin*, at the sittings at Guildhall in last Michaelmas Term, who directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. A rule was accordingly granted, and it has been argued before us.

The only evidence given at the trial was an indenture made between the plaintiff and the defendant, dated the 19th September, 1843, and it was admitted that the sum of 200*l.*, therein mentioned and in respect of which the action was brought, was paid and advanced by the plaintiff to the defendant, and that the latter had paid interest upon it up to the time of the commencement of the action. The indenture commenced by reciting a mortgage by indenture of lease and release, dated 20th and 21st June, 1830, by Leman to Studley of certain lands in Devonshire to secure the payment of 700*l.* with interest. It then recited another indenture, dated 16th February, 1835, whereby Leman further charged the lands mortgaged with an additional sum of 530*l.* and interest. It then recited that Leman had died in 1837, and by his will had devised, together with other property, the lands, the subject of the said mortgage; and further charged to the defendant and certain others (who had disclaimed), their heirs and assigns, upon trust, as soon as conveniently could be after his decease, absolutely to sell and dispose thereof for the best price that could be gotten for the same, and to apply the purchase money in payment of his debts, &c., and the residue upon certain trusts.

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It then recited that the said two principal sums of 700*l.* and 530*l.*, together with an arrear of interest, was due to Studley, and that by an indenture dated the 18th September, 1843, and made between Studley and certain other parties, he in consideration of the payment of his debt and all interest due thereon, had assigned to the plaintiff the said mortgaged premises to have and to hold to him, his heirs and assigns, for ever on security for the said debt. The indenture then recited that the whole of the said principal sums and interest were due to the plaintiff, and that the defendant not being able to effect a sale of the said premises, and having immediate occasion for the sum of 200*l.* for the purpose of paying off a portion of the debts of Leman, had applied to the plaintiff to advance that sum to him upon the security of the mortgaged premises, which the plaintiff had agreed to do on having the same, with interest, secured to him by the *said presentz*. The indenture then witnessed that in consideration of the 200*l.* then paid, the defendant charged the said premises to and with the payment of the said sum of 200*l.* so then advanced and lent together with interest. There then followed several covenants in order to render the charge effectual, and in which the sum of 200*l.* is more than once described as money *lent and advanced*; and the defendant covenanted that *he, his heirs, executors and administrators, should and would, out of the monies which should come to his hands as such trustee as aforesaid from all and singular the lands comprised in the said securities, or the personal estate (if any) of the said Leman, pay or cause to be paid to the plaintiff, his executors, &c., the said principal and interest and other money secured by the said indenture and every of them, and also the principal and interest money intended to be thereby secured.*

It was argued before us on behalf of the plaintiff, that the fact of a loan involved in it a liability to pay and

subjected the borrower to an action of debt; and that the circumstance of a mortgage—a charge upon land, being given to secure it did not affect the right of the lender to sue the borrower, and a case of *Yates v. Aston* (a) was cited. On the other hand it was argued on behalf of the defendant, that the lending and borrowing of money is like any other contract, and that the right of the lender and the liability of the borrower depends upon the contract between them; and that there was no reason why in the case of a loan of money the ordinary rule should not apply, viz., that where the contract is reduced to writing in order to define and give evidence of the transaction between the parties, that the writing and the writing alone should regulate their respective rights and liabilities; and that the absence of the ordinary absolute covenant to pay in the indenture of the 19th September, 1843, and the presence of another covenant whereby the defendant covenanted to pay not absolutely but only out of such monies as should come to his hands, coupled with the fact that he was a mere trustee and had no personal interest in the transaction, shewed that it was never intended to create, as between him and the plaintiff, the relation of creditor and debtor as upon a simple loan of money. The maxim, "expressio unius est exclusio alterius" was pressed upon us as applying to this case.

Upon consideration, we think the argument on behalf of the defendant ought to prevail, and that the rule to enter a nonsuit ought to be made absolute. If the facts were the same as in *Yates v. Aston* we should act upon that authority. The Court there, in giving judgment, say, that the advance being made at the request of the defendant raised a contract by parol for the repayment which was not merged in the security of a higher nature. In the present case the

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(a) 4 Q. B. 182.

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question is, whether a contract by parol can be implied for the repayment where there is an express covenant under seal relative to it. The rule of law, as well as of reason and good sense, is, "expressum facit cessare tacitum;" and where there is an express covenant that the defendant shall, out of the trust funds which shall come to his hands and the personal estate of his testator (which was not included in the mortgage security), pay the sum advanced, we think it impossible to conclude that at the same time he made himself absolutely liable for the payment of it simpliciter; and at all events to do so would be to create a contract by implication different from, and much more onerous than, that entered into by the express words used, and this against a trustee having no personal interest whatever in the transaction.

The Court of Queen's Bench, in the case cited, stated that there was no covenant in the mortgage deed, either express or implied, upon which an action for the money advanced could be mentioned. In the present case there is a covenant expressly upon the subject, although a limited one. This circumstance therefore distinguishes it from *Yates v. Aston*. Several cases were cited from the Courts of equity, by which it seems established that a trustee, with power to sell in order to raise money, is not authorized to borrow money on mortgage. This may be so, and may possibly render the plaintiff's security a bad one, but it can be no reason why a contract should be implied, as against the defendant, more onerous than the one which he entered into upon the same subject-matter by deed under seal, purposely prepared and executed by both parties in order to give effect to the agreement between them. The rule will therefore be absolute to enter a nonsuit.

Rule absolute.

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CAROLINE DEGG, Administratrix of JAMES DEGG, deceased,
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THE declaration stated that the said James Degg, before and at the time of the committing of the grievances, &c., was assisting in the turning and removal from one place to another place of a railway truck in and upon a certain railway, and the defendants were possessed of a railway locomotive engine and divers other trucks, and were by their servants moving and propelling the same over and along the said railway: and the defendants by their said servants, carelessly, negligently and improperly moved and propelled the said trucks upon and against the said truck which the said James Degg was so assisting in turning and removing, without giving any notice or warning to the said James Degg of their intention so to do, or taking any reasonable or proper precautions to avoid or prevent the damage and injury to the said James Degg as hereinafter mentioned; and thereby and by the negligence, carelessness and improper conduct of the defendants by their servants in that behalf, the said James Degg was knocked, jammed and squeezed between a part of the said truck which he was so assisting in turning and removing and a certain wall there, and he was thereby greatly hurt, bruised and injured, insomuch that by reason thereof the said James Degg afterwards, and within twelve calendar months next before the commencement of this suit, died, leaving the said Caroline Degg, his wife, &c., him surviving, &c.

The rule of law, that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work.

Therefore, where the servants of the defendants, a railway Company, were turning a truck on a turntable, and a person not in the employment of the defendants volunteered to assist them, and whilst so engaged, other servants of the defendants negligently propelled a steam-engine and thereby caused the death of the person who so

volunteered: and the servants were persons of competent skill and the defendants did not authorize the negligence.—*Held*, that the defendants were not liable to an action by the personal representative of the deceased.

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Pleas—First: not guilty. Secondly: that before and at the time when, &c., the said James Degg was voluntarily assisting and acting with certain servants of the defendants in turning and removing the said truck in the declaration first mentioned from one place to another place upon the defendant's railway; and that the said other servants of the defendants by whose negligence, carelessness and improper conduct the said damage and injury to the said James Degg are alleged to have accrued, were at the said time when, &c., persons of ordinary skill and care to move and propel, and were competent to move and propel, the said trucks in the declaration secondly mentioned, over and along the said railway, in a proper manner, and so as not to occasion any damage or injury to the said James Degg, the said servants of the defendants, or any of them, whilst employed in turning and moving the said turntable; and the defendants further say that the said alleged negligence, carelessness and improper conduct of the said servants of the defendants in that behalf, were, at the said time when, &c., and always, wholly unauthorized by and without the knowledge, licence, or consent of the defendants.

Replications taking issue on both pleas.

Demurrer to second plea.

At the trial before *Alderson*, B., at the Gloucester Summer Assizes, 1856 (a), it appeared that the action was brought by the widow and administratrix of one James Degg, to recover compensation for the death of her hus-

(a) The cause had been previously tried before *Cresswell*, J., at the Gloucester Spring Assizes, 1856, when a verdict was found for the plaintiff. On this occasion the only plea was "Not guilty." In last Trinity Term a rule was made absolute for a new

trial on the ground that the verdict was against evidence; and the Court having intimated a doubt whether the defence was open under the plea of not guilty, the second plea was afterwards added.

band under the following circumstances.—The deceased, who was in the employ of Messrs. Pickford, the carriers, was engaged in unloading a truck upon a siding at the Cheltenham Station of the Midland Railway Company. Next to the truck was a turntable at which three servants of the Company were attempting to turn a truck, and two or three yards beyond the turntable was a goods shed. The deceased, who was in the shed, observing that the men had difficulty in turning the truck on the turntable, called out to them to stop and he would help them, and he immediately jumped down from the shed, and came to their assistance. Whilst he was pushing, with his head close to one of the buffers of the truck on the turntable, a steam-engine, which came into the siding for the purpose of "shunting" some empty trucks, forced those trucks against the nearest truck to the turntable, and that truck was in consequence driven against the truck on the turntable, and caused the latter truck to be driven beyond the rim of the turntable towards the shed, by means of which the head of the deceased was fixed between the buffer of the truck and the wall of the shed, and he afterwards died from the injuries which he received. Evidence was adduced to shew that there was negligence on the part of the engine-driver in not sounding the whistle, and that the signal-man had omitted to stop the engine in due time. On these points, however, there was conflicting testimony.

The learned Judge left it to the jury to say, whether the injury was caused by the negligence of the defendants' servants, telling them that in such case the plaintiff was entitled to the verdict on the first issue. With respect to the second issue, his Lordship told the jury that if the defendants' servants on other occasions were persons of ordinary skill and care, and competent to "shunt" the

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trains, they ought to find that issue for the defendants, even though their servants were on this occasion guilty of negligence. The jury found a verdict for the plaintiff on the first issue, and for the defendants on the second, and leave was reserved to the defendants to move to enter a verdict for them on the first issue.

*Keating*, in the following Term, obtained a rule nisi accordingly, on the grounds that the defendants were entitled to the verdict on proof of the facts stated in the second plea; and also that the deceased Degg, being on the Company's premises without their knowledge or consent, they were not liable to him for their negligence.

*Pigott*, Serjt. (*Skinner* with him), argued (a) in support of the demurrer, and shewed cause against the above rule.— The plea affords no answer to the action, because it admits that the injury was caused by the act of the defendants' servants. That act was an act of commission, and though it was not of itself illegal, the defendants are responsible because they did not take due care, by giving notice, to prevent the injury. In *Bird v. Holbrook* (b) the plaintiff, who was a trespasser, was wounded by a spring gun set by the defendant in his garden, without notice, and it was held that the defendant was liable to an action. There the act of placing the spring-gun was not of itself illegal, but only became so by reason of the consequences. *Bird v. Holbrook* was preceded by *Deane v. Clayton* (c) and *Ilott v. Wilkes* (d). In *Deane v. Clayton* the plaintiff's dog, whilst in pursuit of a hare, was killed by a spike placed by the defendant on his land for the protection of his preserves; and the Court were equally divided in opinion as

(a) In last Michaelmas Term,  
 November 22, and in Hilary  
 Term, January 14.

(b) 4 Bing. 628.  
 (c) 7 Taunt. 489.  
 (d) 3 B. & Ald. 304.

to whether the action was maintainable. *Ilott v. Wilkes* (*a*) decided that a trespasser, who has notice that a spring-gun is set in a wood, although he may be ignorant of the particular spot where it is placed, cannot maintain an action for injury done him by firing the gun. [*Pollock*, C. B.—In that case the Court intimated an opinion that if a trespasser injured himself in endeavouring to get over a wall stuck with spikes or broken glass, the owner would not be liable.] The reason is that the trespasser would have distinct notice of the danger. [*Bramwell*, B.—Suppose an old well in a garden is covered with a rotten cover, if a trespasser fell through it, would the owner be liable? Then suppose, further, that the owner had placed on the well a rotten cover, would that make any difference?] He would be liable for the injury resulting from his neglect to give notice of the danger. The cases referred to shew that where an injury results to a person from the *wilful act* of another, he is liable to an action, notwithstanding the person injured was a trespasser. The same principle applies to an injury resulting from *negligence*. *Lynch v. Nurdin* (*b*), *Davis v. Mann* (*c*), *Barnes v. Ward* (*d*), are authorities that a person may maintain an action for injury caused to him by the negligence of another, although that injury would never have occurred but for his own unlawful act. [*Pollock*, C. B.—Suppose A. is carrying through a crowded thoroughfare a quantity of corrosive acid in a thin vessel, and B. negligently runs against him, whereby the vessel is broken and A. is injured, is A. entitled to maintain an action?] A person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence that the mischief would not have arisen if the person injured had not himself been

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(*a*) 3 B. & A. 304.  
 (*b*) 1 Q. B. 29.

(*c*) 10 M. & W. 546.  
 (*d*) 9 C. B. 392.

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guilty of negligence: *Rigby v. Hewitt* (*a*): *Greenland v. Chaplin* (*b*). *Lygo v. Newbold* (*c*) proceeded on the ground that the plaintiff had brought the mischief wholly upon himself. The circumstance of the deceased having been a volunteer does not affect the right of action. In *Paterson v. Wallace* (*d*), Lord Cranworth, C., after observing that a master is not by the law of England responsible for injury caused to one servant by the negligence of another, said, “When, however, the accident happens, not to a servant, but to a stranger, i. e., to one of the public, the master is bound, both in England and Scotland, to make reparation.” [*Pollock*, C. B.—That means one of the public generally, not a person who volunteers to help servants.] The doctrine laid down in *Priestley v. Fowler* (*e*) applies only to hired servants. The principle is, that a servant, when he hires himself, undertakes to run all ordinary risks of the service, including the negligence of fellow-servants: *Hutchinson v. The York, Newcastle and Berwick Railway Company* (*f*), *Wiggett v. Fox* (*g*). In this case, the deceased could have no knowledge of the risk, and there was no undertaking on his part to incur it. The declaration charges an act of commission, not of mere omission. That distinction is pointed out by *Bramwell*, B., in his judgment in *Southgate v. Stanley* (*h*). Where the act is one of commission a trespasser would be entitled to maintain an action, and a volunteer cannot be in a worse position.—He also referred to *The Manchester, Sheffield and Lincolnshire Railway Company v. Wallis* (*i*).

*Keating* and *Phipson* appeared for the defendants, but

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| ( <i>a</i> ) 5 Exch. 240. | ( <i>f</i> ) 5 Exch. 343.          |
| ( <i>b</i> ) Id. 243.     | ( <i>g</i> ) 11 Exch. 832.         |
| ( <i>c</i> ) 9 Exch. 302. | ( <i>h</i> ) <i>Ante</i> , p. 247. |
| ( <i>d</i> ) 1 Macq. 748. | ( <i>i</i> ) 14 C. B. 213.         |
| ( <i>e</i> ) 3 M. & W. 1. |                                    |

the Court said that, as at present advised, it was not necessary to hear them on either question. They referred to *Tarrant v. Webb* (a).

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The judgment of the Court was now delivered by

**BRAMWELL, B.**—In this case there were two questions for our determination, the first, whether the plea demurred to was good, the second, whether the verdict found for the plaintiff on the general issue should stand or be entered for the defendants. We reserved our judgment, not from any doubt on the merits of the dispute between the parties, but from a difficulty as to the point of pleading raised by the second question.

The facts stated by the declaration and the plea demurred to may be thus summed up. The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service with those carriages and engines: the deceased voluntarily assisted some of them in their work: other of the defendants' servants were negligent about their work, and by reason thereof the deceased was killed: the defendants' servants were persons competent to do the work: the defendants did not authorize the negligence.

We are of opinion that, under these circumstances, the action is not maintainable. The cases shew that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable: and it might be enough for us to say that those cases govern this, for it seems impossible to suppose

(a) 18 C. B. 797.

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that the deceased, by volunteering his services, can have any greater rights or impose any greater duty on the defendants than would have existed had he been a hired servant. But we were pressed by an expression to be found in those cases to the effect that "a servant undertakes as between him and the master to run all ordinary risks of the service, including the negligence of a fellow-servant:" *Wiggett v. Fox* (*a*); and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen, as it would be if he were paid for his services.

But we were also told that there was and could be no agreement; that Degg was a wrongdoer, and therefore the action was maintainable. It certainly would be strange that the case should be better if he were a wrongdoer than if he had not been. We are of opinion that this argument cannot be supported. We desire not to be understood as laying down any general proposition that a wrongdoer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie. Nor do we desire to give any opinion on the cases cited of *Bird v. Holbrook* (*b*), and *Lynch v. Nurdin* (*c*). But it is obvious, and a truism, to say that a wrongdoer cannot, any more than one who is not

(*a*) 11 Exch. 832.

(*b*) 4 Bing. 628.

(*c*) 1 Q. B. 29.

a wrongdoer, maintain an action, unless he has a right to complain of the act causing the injury, and complain thereof against the person he has made defendant in the action. Now it may be, that had the mischief here resulted from the personal act of the master, he knowing that the deceased was there, the master would have been liable; and that as the defendants' servants knew the deceased was on the railway, and because they knew that, were guilty of a wrong to him, they are liable to an action; but on what reason or principle should the defendants be? If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing it, drives carelessly and injures that person, the servant may be liable, but why the master? The law, for reasons of supposed convenience, more than on principle, makes a master liable in certain cases for the acts of his servants—not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets when damage is thereby done. This is a responsibility the law has put on them; there is a duty on them, to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrongdoer have power to create such a responsibility, and such a duty? No reason can be assigned. Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury, as a blow; others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person. It is not negligent or wrong for a man to fire at a mark in his own grounds at a distance from others, or to ride very

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rapidly in his own park; but it is wrong so to fire near to, and so to ride on, the public highway; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong. So the act of firing or riding fast in an inclosure becomes wrong if the person doing it sees there is some one near whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger; it would not be wrong in any one else who did not know that. Now, for a wilful act intrinsically wrong by a servant the master is not liable. By a parity of reason he ought not to be where the act, not wrong in itself, is only so for reasons personal to the servant, and his wilful disregard of them. The master's liability ought to be limited to that which he may anticipate and guard against, namely, the middle class of cases we have put. However this may be, it seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty; and as a direction by the master to drive furiously, or in the way called carelessly, in his park, would not be wrong in the master, it cannot be made so by a trespasser getting there and being hurt, so that, quoad the master, it is *damnum absque injuria*; and if not a wrong in the master when expressly ordered, it cannot be if done by the servant against his orders. The defendants might, if they had thought fit, have directed their servants to move and propel trucks against other trucks without any notice or precaution; in short, to do what the plaintiff complains of, and if their servants chose to work on those terms, although it might be a wasteful way of using their engines and carriages, no one could say it was wrongful: then the deceased cannot make it so by coming there himself. Upon these grounds then, whether he is considered a wrongdoer

or not, we are of opinion the action cannot be maintained, and that the plea is good.

The same consideration determines the points of pleading in the defendants' favour. Not guilty puts in issue the act complained of. Now the defendants did not by their servants carelessly, negligently and improperly move the trucks ; nor was the deceased injured thereby by the negligence, carelessness and improper conduct of the defendants by their servants as such. There was no general carelessness or wrong in the act complained of; a personal wrong only in the defendants' servants relatively to the deceased being there. There was therefore, no negligence in the defendants by their servants, and they are not guilty. The verdict on that plea, therefore, must be for them.

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Judgment for defendants on the demurrer, and rule absolute to enter the verdict for them on the first issue.

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CARLYON v. LOVERING and Others.

Declaration for wrongfully throwing sand, stone, rubble and other stuff into a natural stream of water flowing through the plaintiff's lands, whereby the channel was obstructed and the water flowed over and upon the lands and destroyed their produce.—Fifth plea: that the defendants were the occupiers of lands near to and above the plaintiff's lands and of a tin mine situate within the lands of the defendants; and that the defendants and all other occupiers of the lands and tin mine of the defendants, for twenty years, &c., enjoyed as of right and without interruption, the right from time to time as occasion required, at their free will and pleasure, of working the tin mine and winning therefrom tin and tin ore, and in the course of so working and winning the same, of washing away, by means of the stream of water in the declaration mentioned, where the same flows through the lands and tin mine of the defendants, the sand, stones, rubble and other stuff which were dislodged or severed in the course of so working the tin mine, and of casting and throwing from and out of the tin mine the sand, stones, rubble and other stuff into the said stream where the same flows through the land and tin mine of the defendants, and of having the same washed, and carried away by the flow of the stream towards the sea, to that part of the channel of the stream which is situated within the lands of the plaintiff, as to the lands and tin mines of the defendants appertaining, and for the more beneficial enjoyment thereof, &c. The plea then justified the acts complained of in the exercise of the above right. The sixth plea alleged an enjoyment of the right for forty years. The eighth plea stated that the land of the plaintiff and the land and tin mine of the defendants and the channel of the stream were within the Stannaries of Cornwall and subject to the customs of the said Stannaries, and that there was an immemorial custom for the tanners and miners within the Stannaries, working and winning tin and tin ore from any tin mine near to a stream of water flowing by such mine, to wash away in such stream the sand, stones, and rubble which should become dislodged in the course of working the mine, and cast the same into the stream, &c. The ninth plea stated that the defendants and other occupiers of the land wherein the tin mine of the defendants is situate, for twenty years, &c., enjoyed as of right, and without interruption, the right from time to time as occasion required, at their free will and pleasure, of using the stream where the same flowed through the lands of the defendants for the purpose of getting such minerals as they might desire and be able to get therefrom and for washing away the sand, stones, rubble and other stuff which it might be necessary to dislodge in the course of so getting the minerals and of having the same washed away by the water of the stream, &c. The tenth plea alleged an enjoyment of a similar right for forty years. The twelfth plea alleged an immemorial custom for miners within the Stannaries, working and winning tin and other minerals and things capable of being dug or won from any mine situate near a stream of water, to wash away by means of such stream the sand, stones, rubble and other stuff which should become dislodged in the course of working the mine, &c. On demurrer to these pleas.—*Held*, first, that the fifth, sixth, ninth, and tenth pleas were good, since the right claimed in those pleas might be the subject-matter of a grant. Secondly, that the eighth and twelfth pleas were also good, for the custom alleged in those pleas was not indefinite or unreasonable, the user being limited to the necessary working of the mine.

stream should have run and flowed, and still should run and flow, uninterruptedly in manner aforesaid through the said lands and closes of the plaintiff, in its natural and ordinary course and channel, and not otherwise: Yet the defendants, well knowing the premises, and being in possession of other lands above the said lands so near to and above the said lands and closes of the plaintiff, and of a certain tin mine and china clay work situate within the said lands of the defendants, and then worked by the defendants, heretofore, to wit, on &c., and on divers other days, &c., wrongfully and injuriously cast and threw, from and out of the said tin mine and china clay work aforesaid into the said stream, divers large quantities of sand, stones, rubble and other stuff, which were then necessarily washed and carried down by the flow of the said stream, and were thereby deposited and accumulated in and upon that part of the bed or channel of the said stream which was and is situate within, and bounded on both sides by, the said lands and closes of the plaintiff, whereby the said part of the said bed or channel then became and was greatly obstructed, filled up and raised above its natural and proper level, and divers large quantities of the waters of the said stream, which during the time aforesaid were hindered and prevented from flowing in the ordinary course and channel of the said stream through and away from the said lands and closes of the plaintiff, as they otherwise might and would have done, then penetrated and burst the banks of the said channel and flowed over and upon the said lands and closes of the plaintiff; and by reason thereof the said lands and closes of the plaintiff became, and were and are, covered with sand, stones, rubble and other stuff, and were and are greatly injured and rendered unproductive, and also by reason of the premises, divers woods and plantations of the plaintiff, the grass and other produce then growing

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and being in and upon the said lands and closes of the plaintiff, were spoiled, damaged and destroyed, &c.

Fifth plea.—That before and at the several times of the committing of the alleged grievances, the defendants were the occupiers of the lands in the declaration mentioned, near to and above the said lands and closes of the plaintiff, and of a certain tin mine, in the declaration described as a tin mine and china clay work, situate within the said lands of the defendants; and that the defendants and all other occupiers for the time being of the said lands and tin mine of the defendants, for the period of twenty years next before the commencement of this suit, enjoyed as of right and without interruption, the right from time to time as occasion required, at their free will and pleasure, of working the said tin mine and winning therefrom tin and tin ore, and, in the course of so working and winning the same respectively, of washing away, in, with and by means of the said stream of water in the declaration mentioned, where the same flows by and through the said lands and tin mine of the defendants, all or any part of the sand, stones, rubble and other stuff, which became or were dislodged or severed in the course of so working the said tin mine and winning the said tin and tin ore as aforesaid, and of casting and throwing from and out of the said tin mine, all or any part of the said sand, stones, rubble and other stuff, into the said stream where the same flows by and through the said lands and tin mine of the defendants; and of having the same washed and carried away from the said lands and tin mine of the defendants by the flow of the said stream, down the course of the said stream towards the sea, to that part of the bed or channel of the said stream which was and is situate within and bounded on both sides thereof by the said lands and closes of the plaintiff in the declaration mentioned; as to the said lands and tin mines

of the defendants appertaining, and in respect of the last mentioned lands and tin mine, and for the more beneficial enjoyment thereof: that at the said several times when &c., the defendants, as such occupiers of the said lands and tin mine of the defendants, had occasion to work the said tin mine and to win therefrom tin and tin ore, and did so work and win the same respectively; and in the course of so working the said tin mine and so winning the said tin and tin ore, the defendants washed away, in, with, and by means of the said stream of water, where the same flows by and through the said lands and tin mine of the defendants, some part of the sand, stones, rubble and other stuff, which became and were dislodged and severed in the course of so working the said tin mine and winning the said tin and tin ore; and then cast and threw from and out of the said tin mine the last mentioned sand, stones, rubble and other stuff, into the said stream where the same flows by and through the said lands and tin mine of the defendants, and allowed the same to be washed and carried away from the said lands and tin mine of the defendants by the flow of the said stream, down the course of the said stream towards the sea, to that part of the bed or channel of the said stream which was and is situate within and bounded on both sides thereof by the lands and closes of the plaintiff in the declaration mentioned, doing no unnecessary damage to the plaintiff, as the defendants lawfully might for the cause aforesaid; and by reason of the premises, a small part of the last mentioned sand, stones, rubble and other stuff, necessarily became and was deposited and accumulated in and upon the last mentioned part of the bed or channel of the said stream, and the said part of the said bed or channel necessarily became and was a little obstructed, filled up, and raised above its natural level, and certain small quantities of the waters of the said stream, neces-

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sarily a little penetrated and burst the banks of the said channel, and flowed over and upon the said lands and closes of the plaintiff: quae sunt eadem, &c.

The sixth plea only differed from the fifth in alleging an enjoyment of the right for forty years.

Eighth plea.—That the said lands, closes and premises of the plaintiff, and the said land and tin mine of the defendants, respectively in the declaration mentioned, and the bed or channel of the said stream of water in the declaration mentioned, before and at the several times when, &c., respectively were and are within the Stannaries of Cornwall, and subject to the customs of the said Stannaries; and that within the said Stannaries there now is, and at the said several times when &c. was, and from time whereof the memory of man is not to the contrary has been, a certain ancient and laudable custom there used and approved, that is to say, that the tinners and miners within the said Stannaries lawfully working and winning tin and tin ore from any tin mine or tin work within the said Stannaries, situate upon or near to a stream of water running and flowing by or through such tin mine or tin work, should have and enjoy the right of washing away, in, with, and by means of such stream of water, where the same flowed by or through such tin mine or tin work, all or any part of the said sand, stones, rubble, and other stuff which should become or be dislodged or severed in the course of so working the said tin mine or tin work and winning the said tin and tin ore; and of casting and throwing from and out of the said tin mine or tin work all or any part of the same sand, stones, rubble, and other stuff into the said stream where the same flowed by or through the said tin mine or tin work; and of having the same washed and carried away from the said tin mine or tin work by the flow of the said stream, down the course of

the said stream towards the sea: that at the several times when, &c., the defendants as such tinners and miners within the said Stannaries were lawfully working and winning tin and tin ore from the said tin mine of the defendants, in the declaration mentioned and therein described as a tin mine and china clay work, which said tin mine then was and is situate upon or near to the stream of water in the declaration mentioned, the same then running and flowing by or through such tin mine: and the defendants then, in exercise and enjoyment of the said right, and by virtue of and according to the said custom, washed away, in, with, and by means of such stream of water, where the same so flowed by or through the last mentioned mine, some part of the said sand, stone, rubble and other stuff which became and was dislodged or severed in the course of so working the said tin mine and winning the said tin and tin ore, and then cast and threw from and out of the last mentioned tin mine the last mentioned sand, stones, rubble and other stuff into the said stream where the same flowed by or through the said tin mine, and then had the same washed and carried away from the said tin mine by the flow of the said stream, down the course of the said stream towards the sea, to that part of the bed or channel of the said stream which was and is situate within and bounded on both sides thereof by the lands and closes of the plaintiff, in the declaration mentioned; doing no unnecessary damage to the plaintiff, &c.—The plea then proceeded to allege (as in the fifth plea) that by reason of the premises a small part of the sand, stones, rubble and other stuff necessarily became and was deposited and accumulated in and upon the bed or channel of the stream, &c.

Ninth plea.—That before and at the several times of the committing of the alleged grievances, &c., the defendants

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were the occupiers of the said lands in the declaration mentioned near to and above the said lands and closes of the plaintiff, and of the said tin mine and china clay work situate within the said lands of the defendants: and that the defendants, and all other occupiers for the time being of the said lands wherein the said tin mine and china clay work of the defendants are situate, for the period of twenty years next before the commencement of this suit, enjoyed as of right and without interruption, the right from time to time as occasion required, at their free will and pleasure, of using the stream in the declaration mentioned, and the water thereof, where the same flows by and through the said lands of the defendants, for the purpose of winning and getting all such minerals and other like products of the said lands as they might desire, and be able to win and get therefrom, and for washing away and removing all or any part of the sand, stones, rubble and other stuff which it might be necessary or convenient for them to dislodge or sever in the course of so winning and getting the said minerals and other like products, or which might be collected or accumulated in the course of winning and getting the same; and of having all or any part of the same sand, stones, rubble and other stuff washed away by the water of the said stream, where the same flows by and through the said lands of the defendants, from the said lands of the defendants, by the flow of the said stream down the course of the said stream towards the sea, to that part of the bed or channel of the said stream which was and is situate within and bounded on both sides thereof by the said lands and closes of the plaintiff in the declaration mentioned, as to the said lands of the defendants appertaining, and in respect of the said last mentioned lands, and for the more beneficial enjoyment thereof: that at the said several times when, &c., the defendants, as such occu-

piers as aforesaid of the said lands of the defendants, being desirous of winning and getting the tin, minerals and also other like products of the said lands, to wit, china clay, did, in exercise of the said right, use the said stream and water thereof, where the same flows by and through the said lands of the defendants, for washing away and removing the sand, stones, rubble and other stuff which it was necessary and convenient for them to dislodge or sever in the course of so winning and getting the said tin, minerals, and other like products of the said lands, and which were collected and accumulated in the course of so winning and getting the same; and had the last mentioned sand, stones, rubble and other stuff washed away by the water of the said stream, where the same flows by and through the said lands of the defendants, from the said lands of the defendants by the flow of the said stream down the course of the said stream towards the sea, to that part of the bed or channel of the said stream which was and is situate within and bounded on both sides thereof by the said lands and closes of the plaintiff in the declaration mentioned, doing no unnecessary damage to the plaintiff, as the defendants lawfully might for the cause aforesaid.—The plea then proceeded to allege (as in the fifth plea) that by reason of the premises a small part of the sand, stones, rubble and other stuff necessarily became and was deposited and accumulated in and upon the bed or channel of the stream, &c.

The tenth plea only differed from the ninth in alleging an enjoyment of the right for forty years.

The twelfth plea was similar to the eighth, alleging an immemorial custom for the "miners within the said Stannaries lawfully working and winning tin and other minerals and things capable of being dug or won from any mine or work within the said Stannaries situate upon or near to

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a stream of water running and flowing by or through such mine or works," to "have and enjoy the right of washing away, in, with and by means of such stream of water, where the same flowed by or through such mine or work, all or any part of the sand, stones, rubble and other stuff which should become dislodged or severed in the course of so working the said mine or work, and winning the said tin and other minerals or things capable of being won from such mine," &c.

Demurrsers and joinders therein.

Collier argued in support of the demurrsers in last Hilary Term (January 21.)—The claim set up in these pleas cannot be supported, either by way of prescription or custom. It is a claim of right by the occupiers of lands, within which there is a tin mine, to throw into the stream which flows through the plaintiff's lands, stones and rubbish, without any restriction or limitation as to time or quantity, notwithstanding the effect is to cause the stream to overflow the plaintiff's land and destroy its produce; and moreover, the right is not claimed as necessary for working the mine, but for the more beneficial enjoyment thereof. Such a claim is unreasonable and bad in law. In Vin. Abr. "Customs" (H.) 29, it is said: "The reasons by which a custom is supported are generally these:—First, because the party that is bound by it has benefit by it. Secondly, that the party that claims the advantage of it is at charge by reason of it. Thirdly, that it may have a reasonable commencement, or suppress fraud." Applying those tests to this case, it is clear that the claim is bad as a custom. The party bound by it has no benefit from it; the party claiming the advantage of it has no charge in respect of it, and it is difficult to see how it could have had a reasonable commencement. [Martin, B.—The

words of the Prescription Act, 2 & 3 Wm. 4, c. 71, s. 2, are, "no claim which may be lawfully made by custom prescription, or *grant*," &c. May not a person legally grant to another the liberty of throwing rubbish in a stream flowing through his lands?] The right here claimed, if exercised to its full extent, would altogether deprive the plaintiff of the beneficial enjoyment of his land. In *Broadbent v. Wilks* (a) the defendant justified under a custom for the lord of a manor, or his tenants, to sink pits for the working of his coal mines, and to place the rubbish coming therefrom in heaps on the land near such pits, at the will and pleasure of the lord; and such a custom was held bad. In delivering the judgment of the Court of Error in the same case (b), Lee, C. J., said the custom was void, "because it was very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate and defeat him of the whole profits of his land; and savours much of arbitrary power, being pleaded to be at the will and pleasure of the lord, and to do it as often and when he pleases." So here the right is claimed, not at a convenient time, and with limitation as to the quantity of rubbish thrown into the stream, but at all times and without limit, at the will and pleasure of the defendant. *Broadbent v. Wilks* shews that such a claim is bad as a custom, and the reasons on which that judgment is founded apply equally to prescription: *Clayton v. Corby* (c). No doubt some customs have been supported, though they tended to the detriment of the owner of the soil, but in those cases the custom has either been beneficial to the community, or the owner of the soil has received compensation or derived a profit from the custom. Thus, a custom

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- (a) Willes, 360. (b) *Wilks v. Broadbent*, 1 Wils. 63.
 (c) 5 Q. B. 415, 422.

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for victuallers to erect booths at a fair held at certain times of the year on the waste of a manor, paying a certain sum to the lord, has been held reasonable: *Tyson v. Smith* (*a*). There, however, the custom did not destroy the soil; it was only exercised at certain times, and it gave a profit to the owner of the soil for the use of the same. But a claim of right by the occupier of a brick kiln to dig and carry away so much clay from a close as was at any time required by him for making bricks, is bad: *Clayton v. Corby* (*b*). There Lord *Denman*, C. J., in delivering the judgment of the Court, said: "It is observable that in all cases of a claim of right in *alieno solo*, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction." *Hilton v. Lord Granville* (*c*) is also an authority that a claim which is destructive of the subject matter of the grant cannot be set up by any usage. There the claim was to work mines under dwelling houses, paying to the occupiers of the surface a reasonable compensation for damage thereto, when demanded, but without making compensation for damage to the houses; and it was held that such a right could not be pleaded either by way of prescription or custom. *Rogers v. Brenton* (*d*), in which there was a claim of profit in *alieno solo*, related to the Cornish custom of tin-bounding. In *Dyce v. Lady James Hay* (*e*), the principle was affirmed, that "there can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected." That principle applies equally to a custom.

Montague Smith (J. B. Karslake with him), contrâ.—

(*a*) 6 A. & E. 745. In error,
 9 A. & E. 406.
 (*b*) 5 Q. B. 415.

(*c*) 10 Q. B. 26.
 (*d*) 5 Q. B. 701.
 (*e*) 1 Macq. 305.

The claim may be supported either by way of prescription or custom. It might have been pleaded as derived from a lost grant. That, however, is rendered unnecessary by the 2 & 3 Wm. 4, c. 71, s. 2, as this is a claim which may be lawfully made by *grant* within the meaning of that Act. Prescription is founded on a supposed grant. It essentially differs from custom. A custom must be reasonable, but there may be a grant of a right to do something on the land of another to his injury. The right of tin-bounding set up in *Rogers v. Brenton* (*a*) originated in grant (*b*). Here the user does not deprive the plaintiff of the entire enjoyment of his land, but merely encumbers it. All affirmative easements authorize the commission of acts which, in their very inception, are positively injurious to another—as a right of way across a neighbour's land, or a right to discharge water—every exercise of which right may be the subject of an action: Gale on Easements, p. 15, 2nd ed. A business which creates a nuisance may have been carried on for such a length of time that the law will presume a grant: *Bliss v. Hall* (*c*). So, a person may acquire a right to discharge foul water in a water-course on the land of another: *Wright v. Williams* (*d*). In that case the water was impregnated with metallic substances, here it is mixed with sand. There is nothing repugnant in a grant of this kind. Then it is said that it is too indefinite, but it is impossible to define it more clearly. *Broadbent v. Wilks* (*e*) was the case of a custom, which must have a reasonable commencement. In *Tyson v. Smith* (*f*) *Tindal*, C. J., points out the distinction between custom, and prescription which is founded in grant.

(*a*) 10 Q. B. 26.

(*d*) 1 M. & W. 77.

(*b*) Id. 65, note.

(*e*) 1 Willes, 360.

(*c*) 5 Scott, 500.

(*f*) 9 A. & E. 406, 417.

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In *Hilton v. Lord Granville* (*a*) the right claimed was destructive of the entire surface, and the judgment of the Court proceeded on the ground that even if there had been an actual grant it would have been void as repugnant to the subject matter. Here there may have been a grant of the surface, with liberty to use the stream for the purpose of working the mine. It is not a claim to deprive the plaintiff of the enjoyment of his land, but merely to use the stream when the working of the mine required it. [*Watson*, B., referred to *Smart v. Morton* (*b*)]. In *Clayton v. Corby* (*c*), which was a case of prescription, the Court founded their judgment on cases relating to custom; and they assume that the claim was an indefinite claim to take all the clay, or, in other words, to take from the owner the whole close. This is not a claim of profit à prendre, but merely to burthen the land: *Manning v. Wasdale* (*d*). It is a good custom, because the working a mine and getting the underground profits is as beneficial to the community as taking the surface profits. In *Rogers v. Brenton* (*e*) a custom to enter on the waste land of another and dig for tin ore was held good; but to keep possession without working was unreasonable.

Collier replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

WATSON, B.—This was a demurrer to several pleas. The fifth, sixth, ninth, and tenth pleas were under the

- (*a*) 5 Q. B. 701.
 (*b*) 5 E. & B. 30.
 (*c*) 5 Q. B. 415.

- (*d*) 5 A. & E. 758.
 (*e*) 10 Q. B. 26.

Prescription Act 2 & 3 Wm. 4, c. 71, s. 2, and the eighth and twelfth pleas were founded on alleged customs.

The declaration was for fouling, and sending rubbish down a natural stream of water running through the plaintiff's land. The effect of the fifth, sixth, ninth, and tenth pleas was, that the defendant was possessed of a tin mine higher up the stream than plaintiff's land, and in respect thereof had used as of right the privilege of washing away by means of the stream above the plaintiff's land, the sand, stones, rubble, and other stuff which became dislodged or severed in the course of working of the tin mine and using the tin and tin ore. The user in some pleas was alleged to have been for twenty years, others of these pleas were founded on an user of forty years.

We are of opinion that these pleas are good in law. The words of the statute are: "That no claim which may be lawfully made by any custom, prescription, or grant, to any watercourse, or the use of any water which shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such way shall have been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible."

This alleged privilege was a claim to a water course under that Act: *Wright v. Williams* (a) but it was contended that such a privilege could not be the subject matter of grant, inasmuch as excessive user might injure the plaintiff's property to such an extent as to exclude the plaintiff from the entire enjoyment of his land. The question is,

(a) 1 M. & W. 77.

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considerations. The question is whether or not the custom as pleaded is good in law. It is settled that a custom to be valid in law must be reasonable, certain and defined. It was objected that the custom as pleaded in the present case was unreasonable and indefinite, as the exercise of the custom might go to the destruction of the plaintiff's land adjoining the stream; that there was no limit to the user as to times of user or extent of user. No doubt if that were so the pleas would be bad; but we think they are not open to these objections. The exercise of the privilege as claimed, was in respect of working a mine and winning the ore where the stream passed through the defendant's land. Thus the user is limited to the necessary working of the mine and the quantity of water sent down, although not expressly so alleged. The case of *Wilkes v. Broadbent* (a), was pressed on us as a conclusive authority against these pleas. In that case, the tenant of the lord of a manor justified under a custom to dig the mines and lay the rubbish on the surface in heaps upon the land near the pits, at the will and pleasure of the lord, and the alleged custom was held bad because it was uncertain—the words "*near to*" were of too great latitude: secondly, because it laid too great burthen on plaintiff, and being at the will of the lord, savours of arbitrary power. We do not think this custom open to these objections. It is not to take the land or any part of it, but merely to pollute the water of this stream in the course of working the mine. We do not see that this has a tendency to destroy the plaintiff's land or exclude the plaintiff from the use of his land, except to a partial extent. We think that the custom alleged is sufficiently definite and is not unreasonable. It is possible, more stuff from the mine may come down at one time than

(a) 1 Wilson, 63; Willes, 360.

at another; but that does not shew that the custom is bad. (See *Tyson v. Smith* (*a*)). We think that as it is to be confined in user to the necessary working of the mine, &c., that the pleas are good and that there must be judgment for the defendants.

Judgment for the defendants.

(*a*) 6 A. & E. 745. In error, 9 A. & E. 406.

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BY agreement of the parties, the following case was stated for the opinion of this Court:—The ship “Caroline,” belonging to the plaintiff, was chartered in the beginning of the year 1843 by the Emigration Commissioners, on the part of her Majesty’s government, to carry emigrants to Australia; and according to the charter, the ship was to

The plaintiff and defendant agreed by charter-party that the plaintiff’s vessel should sail to Sydney and Moreton Bay, and thence proceed to Callao, Peru,

where the captain should report his arrival to Messrs. G., who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed; and after completing her loading, proceed to any safe port in the United Kingdom: freight to be paid at the rate of 4*l.* sterling per ton weight of guano. “*The owners guarantees that for the freight of 4*l.* per ton, the ship shall be dispatched from Australia within 21 days after arrival; if detained over 21 days &c. 3*l.* 10*s.* per ton to be the rate of freight.* If ordered from Sydney to Moreton Bay the time so occupied not to be reckoned in the days as above.” The vessel sailed from Liverpool on the 5th July, 1853, and anchored inside Sydney Heads on the 25th October, 1853. She was ordered to Moreton Bay, but bad weather and the insubordination of a portion of the crew prevented the vessel from leaving Sydney Harbour until the 4th November, when she proceeded on her voyage, and on the 12th anchored inside the Flanders Rocks and outside Moreton Bay. She was taken in charge of a pilot up the channel and on the 14th arrived at her anchorage where she remained until the 5th December. Some of the crew having deserted and others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, and no addition to the crew could be procured at Moreton Bay. On the 5th December the master caused the anchor to be got up and the sails set by the men who were willing to work, with the assistance of the harbour master and pilot’s crew, and the vessel proceeded on her voyage to Callao, but shortly afterwards stopped from the wind failing. During the night several of the seamen deserted. On the 6th the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, and they compelled the captain to return to Sydney. The vessel arrived at Sydney on the 12th December and remained there until the 6th January, 1854, when she sailed to Callao, where she ultimately arrived and brought home a cargo of guano.—*Held*, that under the above circumstances, the ship was not *dispatched* from Australia within twenty-one days after her arrival, and consequently that the plaintiff was not entitled to the freight of 4*l.* per ton.

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call at Watson's Bay, which is situate about  $3\frac{1}{2}$  miles from and below Sydney, in order to receive orders whether to proceed to Sydney or to Moreton Bay for the purpose of landing the emigrants.

After the making of this charter, the plaintiff made and entered into the following charter-party, for the homeward voyage, with the defendants:—

Charter-Party. London, 28th May, 1853.

It is hereby mutually agreed between W. Sharp, owner of the "Caroline," &c., on the one part, and Messrs. A. Gibbs and Sons, merchants, on the other part, as follows:—That the said vessel shall sail on or in all June, 1853, to Sydney <sup>and</sup> or Moreton Bay, and thence proceed with all convenient dispatch to the port of Callao, Peru, and there deliver what coals she may take as ballast, where the captain shall immediately report his arrival to Messrs. W. Gibbs & Co. of Lima. That the said vessel being then tight, staunch, strong, and well conditioned for the voyage, Messrs. W. Gibbs & Co. shall, within 48 hours after such report being received, send to the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel shall at once proceed. (Then followed other provisions not material to the present question.) The said vessel shall, after completing her loading, proceed to any safe port in the United Kingdom, &c. The freight to be paid in manner hereinafter mentioned, at the rate of four pounds, £4, sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam, &c. (Then followed provisions as to the mode in which the freight was to be paid.)—The owners guarantee that for the freight of £4 per ton, the ship shall be dispatched from Australia within 21 days after arrival; if detained over 21 days and under 70 days £3 10s. per ton only to be the rate of freight; and if detained over 70 days £3 per ton. If ordered from Sydney to Moreton

Bay, the time so occupied not to be reckoned in the days as above.

"W. SHARP,  
A. GIBBS & SONS."

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The "Caroline" sailed from Liverpool on the 5th July, 1853, and anchored inside Sydney Heads on the 25th October, 1853. Sydney Heads are situate on the east coast of Australia,  $1\frac{1}{4}$  miles below Watson's Bay, and  $5\frac{1}{2}$  miles from the town of Sydney, and are within the harbour of Sydney. The ship could not get up to Watson's Bay on account of the weather. On the same morning the captain went up to the town of Sydney and returned in the evening, having received orders to pursue his voyage to Moreton Bay, also on the east coast of Australia, about 500 miles to the north of Sydney, and land the emigrants there.

The town of Brisbane is the only town at Moreton Bay, and the emigrants were destined for that place. There was bad weather for several days up to the 28th inclusive; and it was not reasonably prudent for the ship to put to sea. The crew also refused to work about the 27th, and on the 31st October the captain was obliged to call for the intervention of the police magistrate, who came on board and took several of the crew out of the vessel. The insubordination of a portion of the crew continued more or less until the 4th November, and thereby prevented the "Caroline" from leaving the harbour of Sydney, and on the 4th November the vessel proceeded out of the harbour on her voyage.

The "Caroline" on the 12th November anchored inside the Flanders Rocks and outside Moreton Bay. On the 12th the pilot came on board of her, and the sea log ended. The "Caroline" was taken under the charge of the pilot up the channel on the 13th, and on the 14th arrived

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at her anchorage, where she remained until the 5th of December.

The crew of the "Caroline" consisted originally of twenty-eight persons, besides the master; nine of these, however, were supernumeraries, who were only required whilst the emigrants were in the ship, and who were discharged at Moreton Bay. The remaining twenty-nine were bound by their articles to perform the whole voyage until the ship returned to England. Nineteen of the twenty-nine refused to perform their duty at Sydney on the 27th October, and were in consequence taken into custody of the police on the 31st October, and remained in the custody of the police until the 2nd November, when they were brought back on board the ship in irons. Seven of them then returned to their duty, but the remaining twelve refused, and were in consequence kept in irons on board ship on the voyage from Sydney to Moreton Bay, and on the arrival of the ship at Moreton Bay were lodged in Brisbane Goal in custody. Three of the twelve escaped from custody, and deserted, but the remaining nine were again brought on board the "Caroline" in irons, on the 4th December, and were put in the forecastle as prisoners, but an hour afterwards removed their own irons, and freed themselves from restraint, still, however, refusing to work. Four of the rest of the crew also deserted at Brisbane.

The crew of the ship were not sufficient in number to navigate the vessel safely to Callao, without the assistance of the nine men who were refusing to work, and were unwilling to proceed to Callao. No addition to the crew could be procured at Moreton Bay.

On the 5th December the master, for the purpose of proceeding on the voyage to Callao, caused the anchor to be got up and the sails set by the men who were so as

aforesaid willing to work with the assistance of the harbour master and the pilot's crew, and the vessel proceeded on her voyage, but shortly afterwards stopped from the wind falling light. On the night of the 5th December seven of the men who had been brought on board in irons, and one who had returned to his duty on the 2nd November, escaped from the ship by swimming ashore, and deserted.

On the 6th December the vessel proceeded some distance further, with the assistance of the pilot and harbour master's crew, when the vessel being then under weigh, the crew, with the exception of the captain, the chief mate, one seaman and a boy, refused to proceed on the voyage to Callao, and required the captain to proceed to Sydney, on the alleged ground that the ship was not sufficiently manned. On the 7th December the same men said they would not proceed to Callao and insisted on taking the vessel to Sydney, to which the captain was forced to assent. The whole crew who were on board on the 6th and 7th December were not sufficient in number to safely navigate the vessel to Callao.

The vessel arrived at Sydney on the 12th December, and remained there until the 6th January, 1854, when she sailed for Callao. Sydney is not on the way from Moreton Bay to Callao, but is considerably out of the course of such a voyage. The ship ultimately arrived at Callao, and brought home and delivered a cargo of guano.

The question for the opinion of the Court is, whether, under the circumstances stated, the plaintiff is entitled to the higher rate of freight of 4*l* per ton in the charter party mentioned. If the Court should be of opinion that he is so entitled then judgment by default is to be entered for the plaintiff for 563*l*. 12*s*. 2*d*. If the Court should be of a contrary opinion then judgment of non pros is to be entered.

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*Quain* (*Hugh Hill* with him) for the plaintiff.—The question is whether, under the circumstances stated, the ship was dispatched from Australia within twenty-one days after her arrival, within the meaning of the charter-party. It is submitted, first, that the ship was bona fide dispatched within twenty-one days, for she broke ground [and was removed from her moorings; secondly, that the state of the crew on the 5th December did not neutralize that dispatch. The case falls within the principle laid down as to policies in Arnould on Insurance, vol. 1, p. 599. “If, however, the ship has broken ground on her sea voyage, and once got fairly under sail for her place of destination, on or before the day limited in the warranty, though she may have gone ever so little a way, and she afterwards put back from stress of weather, or apprehension of an enemy in sight, or be stopped by an embargo, or in any way afterwards detained, yet, as there will still have been a beginning to sail *on the voyage insured*, on or before the day, the warranty will be held to have been complied with.” The vessel arrived in Sydney Harbour on the 25th October, 1853, but could not get up to Watson’s Bay on account of the weather; therefore that arrival was not the arrival intended by the charter-party. The ship arrived at Moreton Bay on the 14th November, and left on the 5th December, so that she was dispatched within twenty-one days of that arrival. The captain sailed on the 5th December intending to proceed to Callao, but was prevented by the mutiny of the crew. Having broke ground with a bona fide intention of proceeding, what took place afterwards cannot affect the case. It was the subsequent mutiny alone which caused the ship to be taken to Sydney. [*Martin, B.*—It is clear that the ship was not dispatched within twenty-one days within the meaning of this charter-party: *dispatched* means really sailing on the voyage.]

The warranty only bound the ship to break ground : *Thompson v. Gillespy* (a). The implied warranty to sail in a sea-worthy condition does not include a warranty of sea-worthiness throughout the voyage : Arnould on Insurance, vol. 1, p. 656. *Graham v. Barras* (b) and *Forshaw v. Chabert* (c) shew that if the vessel breaks ground with a complete crew on board, that is a sufficient compliance with the warranty.

*Atherton* appeared for the defendant, but was not called upon to argue.

**MARTIN, B.**—We are all of opinion that the plaintiff is not entitled to the higher rate of freight. The question depends entirely on the meaning of the charter-party and the facts stated as to the voyage. By the terms of the charter-party “the owners guarantee that for the freight of 4*l.* per ton the ship shall be dispatched from Australia within twenty-one days after arrival; if detained over twenty-one days and under seventy days 3*l.* 10*s.* per ton only to be the rate of freight.” It is clear that when the ship arrived at Moreton Bay she was in Australia; then the period ought to be calculated from the time of her arrival there, which was the 14th November, until she weighed anchor, which was on the 5th December. I will assume that it was the captain’s intention, not merely to get out of port, but bona fide to sail on that day. In my judgment it is immaterial what the captain intended, for the facts are, that when the vessel had proceeded a short distance the crew mutinied and insisted on going to Sydney, so that the vessel never reached the turning point, but was taken to Sydney, where she arrived on the 12th December

(a) 5 E. & B. 209. (b) 5 B. & Adol. 1011.

(c) 3 B. & B. 158.

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and remained until the 6th January, when she sailed for Callao. Under these circumstances the question is, whether the ship was *dispatched* from Australia within twenty-one days. It is only necessary to advert to the facts and read the language of the charter-party, and it is impossible to say that the vessel was not detained in Australia beyond twenty-one days. We ought to look to the real meaning of the parties and read the charter-party as it would be understood by any sensible and intelligent person, and not put a refined construction upon it. The rule with respect to policies of insurance is not the proper rule to guide us in a case of this kind. What the charterer meant was, that he would pay the higher rate of freight if the vessel was substantially dispatched from Australia, within twenty-one days, on her voyage to Callao with a reasonable expectation of going there. Instead of that she remained in Australia more than a month after she first weighed anchor. It is impossible to say that the vessel was dispatched from Australia within twenty-one days, when she remained there for thirty-two days, though she was kept by reason of the mutiny of the crew. If any one is to suffer from the improper conduct of the crew, it certainly ought not to be the charterer, who has no controul over them, but the ship owner, who is responsible for their employment.

BRAMWELL, B.—I am of the same opinion. The question depends on the following words:—"The owners guarantee that for the freight of 4*l.* per ton the ship shall be dispatched from Australia within twenty-one days after arrival." In order to ascertain the meaning of the parties we must see what is the meaning of the word "*dispatched*." Now leaving the previous facts out of consideration, and supposing that the only facts stated were the arrival of the vessel at Moreton Bay and her subsequent departure, it is

clear that she was more than twenty-one days in Moreton Bay. But we are called upon to say that she was dispatched from Australia within twenty-one days, and not detained beyond that time. It is a strange proposition, that a vessel which has continued in the harbour for more than twenty-one days has been dispatched within that time. Mr. Quain has given no reason why we should depart from the ordinary meaning of the words "dispatched from Australia," that is, not detained there. The authorities referred to do not apply. The case of *Roelandts v. Harrison* (*a*) is more analogous to the present than any which have been cited. If the question depended solely upon the vessel being in a condition to sail, I should also be disposed to decide against the plaintiff.

Watson, B.—I entirely concur. The vessel was not dispatched from Australia within twenty-one days, for she remained in Moreton Bay beyond that time. The case of *Graham v. Barras* (*b*) also shews that she was not *dispatched* inasmuch as she was not in a sufficient state to perform the voyage. My judgment, however, proceeds on the ground that she was not dispatched within the meaning of the charter party, since she remained in Moreton Bay.

Judgment for the defendants.

(*a*) 9 Exch. 444.

(*b*) 5 B. & Adol. 1011.

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## KIRK and Others v. GIBBS and Others.

Declaration  
on a charter-  
party, whereby  
it was agreed  
between the  
plaintiffs,  
owners of a  
vessel called  
the "Brevet,"  
and the de-  
fendants, that  
the vessel  
should sail to  
Melbourne and  
thence proceed  
to the port of  
Callao, Peru,  
where the  
captain should  
report his arri-  
val to Messrs.  
G. & Co.:that the vessel  
being then  
tight, staunch,  
strong, and  
well condi-

tioned for the voyage, Messrs. G. & Co. should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which should be given to the captain by the charterers' agents free of expense within twenty-four hours of his application.—*Breach*: that the defendants made default in providing the agreed guano, and only provided an insufficient and less quantity.—*Plea*: that the port of Callao and the Chincha Islands are a part of the Republic of Peru, and that by the laws of that Republic every vessel proceeding from Callao to the Chincha Islands, for the purpose of taking on board a cargo of guano, is obliged to procure from the said government a written pass so to do, and the said vessel could not lawfully have proceeded from Callao to the Chincha Islands without such pass: that the vessel was, after her arrival at Callao, surveyed by officers of the said government, and the said government did, upon the report of the said surveyors refuse to give such pass, or to allow the vessel to proceed to the Chincha Islands; and thereupon certain reparations were done to the vessel by the plaintiffs at Callao, and the said government did afterwards give a written pass for the vessel to proceed to the said Island, to take in a cargo of guano, but upon the condition expressed in the pass that more guano should not be placed on board than would make the vessel draw eighteen and a half feet of water: that the vessel did, by virtue of such pass proceed to the Chincha Islands, and the defendants caused to be loaded on board her sufficient guano to make her draw eighteen and a half feet of water, and they could not without violating the laws of the said Republic have loaded a greater quantity, and if they had done so the vessel and cargo would have been liable to seizure by the said government.—*Held*, on demurrer, that the plea was bad, since the obligation was on the defendants to procure the proper pass, and it was not alleged that they were prevented from so doing by reason of the vessel not being well conditioned.

guano at the Chincha Islands, to which place the vessel shall at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which shall be given to the captain by the charterers' agents free of expense within twenty-four hours of his application. After completing her loading of guano, and having obtained the necessary pass from Pisco, the vessel shall return for her final clearance to Callao, &c. (Then followed the usual clause as to restraints of princes, &c., with other stipulations not material to the present question). The said vessel shall, after completing her loading as before mentioned, proceed to any safe port in the United Kingdom, calling at Cork for orders from Messrs. A. Gibbs & Sons, &c.—Averments: that the plaintiffs did all things necessary on their part to entitle them to have the agreed guano provided for the said ship at the Chincha Islands, and that the time for so doing elapsed.—Breach: that the defendants made default in providing the agreed guano, and only provided a quantity of guano insufficient and less than the agreed guano, and dispatched the said ship from the Chincha Islands with such insufficient quantity, whereby the plaintiff was prevented from earning the freight, which according to the charter-party would have been payable, &c.

Plea.—That the port of Callao, and also the Chincha Islands, were, at the time of the making of the charter-party, and from thence hitherto, within and a part of the dominions and territories of the Republic of Peru; and that during all that time, by the laws of the said Republic then and still subsisting, every vessel proceeding from Callao to the Chincha Islands, for the purpose of taking on board a cargo of guano, was obliged to procure from the said government a written pass or permit so to do, and the said vessel called the "Brevet" could not lawfully have proceeded from Callao, under the said charter-party, to

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the Chincha Islands, without such written pass or permit. And the defendants further say, that the said vessel, the "Brevet," was, soon after her arrival at Callao under the said charter-party and previous to proceeding to the Chincha Islands, surveyed and examined by certain officers of the said government, and the said government did, upon receiving the report of the said surveyor, refuse to give such pass or permit, or to allow the said vessel to proceed to the said Chincha Islands for the purpose of loading a cargo of guano there; and thereupon certain reparations were done to the said vessel by the plaintiffs at Callao, and the said government did afterwards give a written pass or permit for the said vessel to proceed to the said island to take in a cargo of guano, but upon the condition, expressed in the said pass or permit, that more guano should not be placed on board the said vessel than would make the vessel draw eighteen and a half feet of water. And the defendants say that the said vessel did, by virtue of such pass or permit, proceed to the said Chincha Islands, and that they did, upon the arrival of the said vessel at the Chincha Islands, cause to be loaded on board her sufficient guano to make her draw eighteen and a half feet of water, to wit, one thousand two hundred and seventy-nine tons of guano; and that the said vessel did, when loaded, draw eighteen and a half feet of water, and that more guano could not have been loaded on board her without making her draw more than eighteen and a half feet of water, and that on that account only the defendants refused to load on board her a greater quantity of guano than was actually loaded. And the defendants say that they could not, without violating the laws of the said Republic, have loaded a greater quantity of guano on board the said vessel; and that if a greater quantity had been loaded, the said vessel and cargo would have been liable to seizure by

the said government of the said Republic, according to the said laws.

Demurrer and joinder thereon.

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*Manisty*, in support of the demurrer.—The declaration alleges an absolute undertaking by the defendants to procure a pass to enable the vessel to load the agreed cargo; the plea states that the defendants were unable to procure such a pass, but that they obtained a pass upon the express condition that they should load only a limited cargo. The question then is, whether the defendants have protected themselves by their contract against the event which has occurred. The charter-party contains no provision for such an event. The defendants undertook to load if the vessel was tight, staunch and strong; and there is no allegation that it was not so. The plea merely states that the defendants could not get a pass without a condition as to loading, and therefore they did not load a sufficient cargo. But they undertook to procure an unconditional pass, and they cannot exonerate themselves from the obligation to load by saying that they could not get it. Where the charterer of a ship covenants to send a cargo alongside at a foreign port, he is not excused from so doing, though all intercourse was prohibited by law, in consequence of the prevalence of an infectious disorder at the port, *Barker v. Hodgson*(a); or by reason of an embargo: *Hadley v. Clarke*(b), *Touteng v. Hubbard*(c).

*Cleasby*, contrà.—It is conceded that a mere embargo would not afford an excuse for not loading; there must be some matter which renders the loading unlawful, such as a blockade. Here the breach assigned is, that the defendants

(a) 3 M. & Sel. 267.

(b) 8 T. R. 259.

(c) 3 Bos. & P. 291, 298.

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did not provide the agreed cargo. They plead that the plaintiffs were not in a position lawfully to receive such cargo, because by the law of the country where the loading was to take place, it was unlawful to load more than a limited quantity in a vessel in the condition of the plaintiffs'. There was an implied undertaking on the part of the plaintiffs that the vessel should be in such a condition that a proper pass could be procured. It was as much the duty of the plaintiffs as the defendants to procure the pass, since it was equally known to both parties when they entered into the contract that a pass was necessary. The meaning of the charter-party is, that as regards the defendants the plaintiff shall be at no expense and suffer no delay in respect of the pass. The defendants were not bound to expose their goods to the risk of forfeiture. [Bramwell, B. In *Rippinghall v. Lloyd* (*a*), which was an action by vendee against vendor, two breaches were assigned; first, that the vendor did not on or before a certain day deduce a good title; secondly, that he did not execute proper conveyances. The vendor pleaded to the second breach, that he would have executed proper conveyances if the vendee would have prepared and tendered them. The vendee replied that he did not prepare the conveyances because the vendor did not deduce a good title: and it was held that whatever the reason might be which prevented the vendee from tendering the conveyances, still as he did not tender them, the vendor was not bound to execute.] That case is an authority that the defendants may set up as an answer to the breach that there was no permit, even though they were bound to procure it. If the ground of action had been that the defendants did not procure a permit, they might have pleaded that the vessel was not in such a condition that a permit could by the law of the country be granted. [Martin, B.—The plea should have

(*a*) 5 B. & Adol. 742.

contained an averment that the vessel was not tight, staunch, strong and well conditioned for the voyage, and that by reason thereof a pass could not be obtained for loading more guano than would make the vessel draw eighteen and a half feet of water.]

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MARTIN, B.—I am of opinion that the plea is bad. It is consistent with every allegation in it that the vessel was tight, staunch and strong, and well conditioned for the voyage, and that being in every way fitted to bring home a full cargo, the Peruvian government improperly refused to grant a pass. If that be the state of things, the loss must fall on the defendants. The charter-party provides that the vessel shall proceed to the port of Callao, where the captain shall report his arrival to Messrs. Gibbs: "that the vessel being *then*," that is, at Callao, "tight, staunch, strong, &c., Messrs. Gibbs shall send to the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel shall at once proceed, calling on her way at Pisco to obtain the necessary pass to load, *which shall be given to the captain by the charterers' agents free of expense within twenty-four hours of his application.*" That seems to me to cast on the defendants the obligation of procuring a pass to enable them to load a full cargo. If the vessel was then tight, staunch, and strong, and the Peruvian government would only grant a limited pass, the defendants and not the plaintiffs must suffer for it, for the defendants undertook to procure the pass and they were not prevented from so doing by any act of the plaintiffs. If the vessel was not in a proper condition, and in consequence the defendants could only get a pass for loading a limited cargo, I think, as at present advised, that the defendants performed their contract, because there was a failure on the part of the

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plaintiffs to perform what they undertook to do, namely, to give the defendants an opportunity of putting a full cargo on board; for a person must have an opportunity of doing what he undertook to do, before he can be liable in damages for not doing it. This plea, however, fails to shew that the defendants were prevented from loading a full cargo by any act of the plaintiffs.

BRAMWELL, B.—I am also of opinion that the plaintiffs are entitled to judgment. I think that the obligation was on the defendants to get the pass; and if their obligation to load were contingent on the pass being got, *Rippinshall v. Lloyd* (*a*) is an authority that they might shew that they had not performed the condition precedent. This is not however a condition precedent, but matter additional. The plaintiffs say "you did not load a full cargo though we were ready and willing to receive it," and it is no answer for the defendants to say, "though you were ready and willing to receive the cargo we would not load because we could not get a proper pass." If the defendants had said, "it is not true that you were ready and willing, for the vessel was in such a condition that the Peruvian government would have prevented you from receiving a full cargo," that might have been a good answer. The defendants however do not say that; but, admitting that the plaintiffs were ready and willing to receive the cargo, they say that they did not load because the pass which they got did not authorize them to do so.

Judgment for the plaintiff (*b*).

(*a*) 5 B. & Adol. 742.

(*b*) *Watson*, B., left the Court in the course of the argument.

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## MARTYN v. WILLIAMS.

Feb. 7.

**COVENANT.**—The declaration stated that Theophilus Faris and Thomas Gill being seized in their demesne as of fee of certain lands called Goonamarth, in the parish of St. Mewan, on the 1st May, 1852, by a certain indenture then made between T. Faris and T. Gill of the first part, and the defendant of the second part, in consideration of the rent thereby reserved, and of the covenants and agreements therein contained, demised and granted to the defendant, his partners and fellow-adventurers, executors, administrators and assigns, full and free liberty, licence, power, and authority to dig, work, and search for clay, commonly called china clay, upon certain parts of the said land delineated in a certain map or plan in the said indenture; and the said clay, when discovered there, to raise, wash, cleanse and to make merchantable and fit for sale, and to carry away, convert and dispose of, to his and their own use, and to dig, work, make and bring such adits, pools, waters, and watercourses, and to erect such sheds, engine houses, and other buildings, as the defendant should think necessary, within the limits defined in the said map or plan, for

The declaration alleged that F., being seized in fee of an estate by indenture, granted to the defendant licence to dig, work, and search for china clay, and to raise, get, and dispose of the same to his own use, to hold and exercise the said liberties for the term of 21 years; and the defendant covenanted with F. and his assigns that he would pay compensation to F. and his assigns, and his leasees and tenants, for all enclosed lands which he might injure; the amount of such compensation to be ascertained, in case

of difference, by two arbitrators, one to be appointed by the defendant and the other by F. and his assigns; and also that the defendant or his assigns would deliver up the works in repair at the expiration of the term: that after the making of the indenture F. conveyed all his estate to the plaintiff; and alleged as breaches: 1st. That though, after the assignment to the plaintiff, the defendant injured certain inclosed lands; and that, though the plaintiff appointed an arbitrator, yet the defendant refused to do so. 2ndly. That the defendant at the expiration of the time did not deliver up the works in repair. At the trial it was proved that the injury to the enclosed lands was before the assignment to the plaintiff. The plaintiff then applied for leave to amend the declaration, by alleging that injury was before the assignment to him.—*Held.* First, that such amendment would have made the first breach bad; Secondly, that if this were otherwise it could not be allowed, because no amendment ought to be allowed which would make the pleading so amended open to a demurrer: Thirdly, that the covenant to deliver up the works in repair ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to enter and take the clay, and that therefore the plaintiff, the alienee of the land, could sue upon it.

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the effectual working of the said clay, and the more effectual exercise of the liberties, licences, &c., thereby granted, to hold, exercise, and enjoy the said liberties for the full term of twenty-one years, determinable nevertheless upon the defendants giving twelve months notice in writing in that behalf to them the said T. Faris and T. Gill. And the defendant did thereby covenant with the said T. Faris and T. Gill, and their assigns, that he the defendant should make and pay all reasonable compensation to the said T. Faris and T. Gill and their assigns, and their lessees, tenant or tenants, for all inclosed lands within the limits defined in the said map or plan, which he the defendant should or might destroy or injure in the course of his workings and diggings for such china clay as aforesaid, the amount of such compensation to be ascertained, in case of difference, by two arbitrators to be appointed, one by the said defendant, the other by the said T. Faris and T. Gill and their assigns: the said arbitrators to appoint an umpire, whose decision, in case of difference between the said arbitrators, should be final. And also that the defendant should and would, during the continuance of the said term, keep and retain such works, and all houses, sheds, engine houses, and other buildings and erections to be erected and built on the said land and premises, in good and sufficient repair; and the same so kept and retained, at the end or other sooner determination of the said term thereby granted, should leave and deliver up, except engines and machinery, which the defendant was to be at liberty to remove: by virtue of which said demise the defendant entered into and upon the said part of the said lands, and dug, worked, and got such china clay, and exercised the said liberties, &c., until and after the 31st day of May, A.D. 1855, on which day they the said T. Faris and T. Gill did, by indenture, &c., give and grant unto the plaintiff the

said lands and ground with the appurtenances, to have and to hold the same unto the said plaintiff, his heirs and assigns, for ever: by virtue of which said indenture the plaintiff became, and was, and still is, seized in his demesne as of fee of and in the said lands and premises, with the appurtenances: that on the 25th of December, A.D. 1855, the said liberties and all the estate, &c. of the defendant in the said demised premises were ended and determined by a twelvemonth's notice given by the defendant pursuant to the said indenture.—First breach: That although the defendant did, in the course of his digging for such china clay, and in the exercise of the said liberties, &c., *and after the plaintiff became seized as aforesaid*, injure and destroy divers parts of the inclosed lands within the limits in the said indenture mentioned and defined, in respect of which the plaintiff and his tenants then became and were entitled to compensation, pursuant to the provisions of the said indenture, and in respect of which damage and injury the plaintiff claimed payment of 83*l.*, which claim was disputed; and although the plaintiff afterwards nominated John Pearce to be the arbitrator on his behalf, to ascertain the amount of compensation to which the plaintiff and his tenants were entitled, and gave notice thereof to the defendant, and required him to appoint an arbitrator on his the defendant's behalf, &c., yet the defendant neglected and refused to refer the matter of the said compensation to arbitration, and prevented the amount of the said compensation from being ascertained by arbitration.—Second breach: That the defendant did not keep the works, &c., in repair.

Pleas—First, not guilty: Secondly, that the defendant did not injure or destroy the said parts of the said lands.

At the trial before *Channell*, Serjt., at the last Summer assizes for the county of Cornwall, it was proved, in respect

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of the first breach, that the defendant had injured and destroyed part of the enclosed land in working for the china clay before the conveyance of the lands to the plaintiff, and that after this conveyance the plaintiff had appointed an arbitrator and required the defendant to appoint another, which he did not do. And as to the second breach, it was proved that after the conveyance certain pit-pans and levels were out of repair, and so left at the determination of the term.

It was objected by the counsel for the defendant, that assuming the interest in the covenants to have passed to the plaintiff by virtue of the conveyance of the lands to him, the first breach was disproved, inasmuch as all the injury to the enclosed land was done previous to the conveyance to him, and that the stipulation as to the arbitration was merely for the purpose of ascertaining the amount to be paid to the person legally entitled to the benefit of the covenant, and that, at all events, the breach expressly alleged that the injury was done after the conveyance to the plaintiff, which was disproved. The learned Serjeant was of opinion that the objection was well founded in both particulars, but he was pressed to allow an amendment by striking out the allegation that the injury was done after the plaintiff became seized. He did so with reluctance, expressing his own opinion that it would be of no avail, and reserving to the Court to determine whether the amendment ought to have been made. It was also objected to the second breach, that the pit-pans and levels left out of repair were not "works" within the true meaning of the second covenant (*a*). The learned Serjeant was of

(*a*) The learned Judge held that the covenant did not apply to certain mica pits and launders which were described as made of timber and moveable. The pit-

pans were dug in the earth and the sides walled up with stone. Some of them were formed with a bank of sand on one side.

opinion that they were, and, after evidence had been given for the defendant, the case went to the jury, who were directed to assess the damages separately on the first and second breaches, which they did; and leave was given to the defendant to move upon all the points which had arisen in the case.

Kinglake, Serjt., having obtained a rule to shew cause why the amendment should not be disallowed and the verdict entered for the defendants as to both breaches, or why the judgment should not be arrested,

Montague Smith and *Phear* now shewed cause (a).—First, the amendment was properly made. The plaintiff is entitled to recover for all the damage done to the land, and he would be a trustee for the persons in possession of the land at the time the damage was done. There was no complete right of action before the time for the appointment of the arbitrator. The right to compensation does not accrue from day to day as each spadeful of clay is dug out, but upon the ascertainment of the damage in the manner pointed out: *Brown v. Overbury* (b). It is in the nature of a continuing breach. [*Watson*, B.—It is not like a covenant to repair. Each successive occupier is entitled to compensation for the injury done during his time. *Martin*, B.—The appointment of the arbitrator is merely a collateral matter.] The breach is not complete without the refusal to appoint the arbitrator. Secondly, the word “works” in the covenant to repair includes the pits and levels—in fact, all the works which are necessary for the getting and dressing of the clay. Thirdly, the covenants are such as run with the land in

(a) Jan. 20th and 22nd. Before *Watson*, B.
Pollock, C. B., *Martin*, B., and (b) 11 Exch. 715.

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respect of which the assignee of the reversion is entitled to sue. The right to take the clay is an hereditament with which a covenant will run. It is true that in *Doe d. Hanley v. Wood* (*a*), it was held that the interest of the grantee is not such as to entitle him to maintain ejectment before entry, but it is an estate capable of being inherited or granted to a stranger: *Muskett v. Hill* (*b*). In *Bally v. Wells* (*c*), a lessee of tithes having covenanted for himself and his assigns that he would not let any of the farmers of the parish have any part of the tithes, it was held that this covenant ran with the tithes, and bound the assignee, against whom the action was brought for a breach of the covenant. That case was confirmed by *The Earl of Egremont v. Keene* (*d*), in the Court of Exchequer in Ireland. It may therefore be considered to be established that covenants will run with the reversion of an incorporeal hereditament. In *The Earl of Portmore v. Bunn* (*e*), Bayley, J., says: "The grantors may have had a mere easement upon the soil of others, to make channels and towing paths. Such an interest, according to the case of *Buckeridge v. Ingram* (*f*), would be a real hereditament. * * * The grant of their interest for a term of years in any such hereditament might operate as the grant of an interest within the 32 Hen. 8, so as to make the assignee of the grantee liable to an action for a breach of covenant by the reversioner." Holroyd, J., said: "I am of opinion that if they had such a legal interest and had made such a grant as is set out in the declaration, it would have operated as a grant of an interest in a real hereditament, and that the assignee of the

(*a*) 2 B. & Ald. 724.

307. See also *Earl of Lucas v.*

(*b*) 5 Bing. N. C. 694.

Gildea, 2 Hudson & Brooke, 635.

(*c*) Wilmot's Notes, 341; S.C.

(*e*) 1 B. & C. 694.

3 Wils. 26.

(*f*) 2 Ves. J. 652.

(*d*) 2 Jones (Exch. Ireland),

grantee would be liable for a breach of the covenant contained in such grant, within the stat. 32 Hen. 8." Here the grant of the licence was by the owner of the fee, and therefore the covenant is annexed to the land. The licence touches and concerns the land; it gives a right to go on the land and take a portion of it. [Martin, B.—The argument on the other side is, that there is no reversion, there is no estate in the owner of the land of the same nature that the licensee has.] From the *Prior's case* (a) it appears that where a chapel was annexed to a manor, so that the lord had an interest in it as lay property and the church had an interest in the spirituals, that common interest would attach a covenant to perform service in the chapel to the manor to which the chapel was appendant, so as to be transmitted with it while they remained unsevered. It is not necessary, therefore, that there should be any reversion. [Watson, B.—Where there is a real covenant annexed to the land, if the land passes into the hands of another, the right of suit on the covenant passes also (b).] They referred also to *King v. Jones* (c) and *Webb v. Russell* (d).

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Kinglake, Serjt., and *Kingdon*, in support of the rule.—As to the first point, the cases of *Raymond v. Fitch* (e), and *Ricketts v. Weaver* (f) establish that the executor of a tenant for life, and not the heir, must sue for the breach of a covenant committed in the lifetime of the testator. The declaration, therefore, as originally drawn, was correct,

(a) Cited by Lord Coke in *Spencer's Case*, 5 Rep. 16; and see Sugden's *Vendors and Purchasers*, 13th ed. 474; 1 Smith's L.C. p. 50, 4th Ed.

(c) 5 Taunt. 418.

(b) See *Middlemore v. Goodale*, 1 Rol. Ab. 521 (K.), pl. 6; C. S. Cro. Car. 503; *Campbell v.*

(d) 3 T. R. 393.

(e) 2 C. M. & R. 588.

(f) 12 M. & W. 718.

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and the amendment was improperly made, because if it could be allowed it would make the declaration bad on demurrer. In *Evans v. Powis* (*a*) it was held that a Judge at Nisi Prius ought not to allow an amendment if its effect would be to render the pleadings demurrable. The covenant to pay compensation is not a real covenant, and does not run with the land; therefore the assignee of the land cannot sue upon it: *Keppell v. Bailey* (*b*).—Secondly, the pits and levels were not works within the meaning of the covenant. As to the last point the 32 Hen. 8. has no application; it applies only in cases between landlord and tenant where there is a reversion in the grantee to which the covenants are annexed. By this licence no estate or interest in the land, or any portion of the land, passed to the grantee: *Doe d. Hanley v. Wood* (*c*). The grant of it did not create any reversion,—there is nothing to revert. [Martin, B.—It is an incorporeal hereditament. It does not come back to the owner of the fee as a separate thing, but when the particular estate ceases it merges in the general dominion which the owner of the soil has in his own land. Is not that sufficient for the purpose of the statute?] In *Bally v. Wells* (*d*) it was said that tithes are something tangible, and that ejectment or an assize will lie for them. Here the lessees did not grant a portion of that which they had, but created a certain right in it; and there is no authority for saying that in such a case there is any reversion with which covenants can run. In the *Prior's case* (*e*) the action was brought by the heir, not by an alienee: the dictum that the action

(*a*) 1 Exch. 601.

(*d*) Wilmot's Notes, 341: S.C.

(*b*) 2 Myl. & K. 517.

3 Wils. 25.

(*c*) 2 B. & Ald. 724. See
Wilkinson v. Proud, 11 M. & W. 33.

(*e*) *Pakenham's Case*, 42 Ed. 3,
 fo. 3 *a*; and see 1 H. 5, 2 *a*.

would have lain by the alienee is not law, and is contrary to two cases in the Yearbooks (*a*). It is a general rule, that if the covenantee has not interest in the land the covenant does not go to the assignee of the land.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This was an action of covenant, which was tried before my brother *Channell* at the last Cornwall Assizes.—(His Lordship then stated the pleadings and facts as above set forth, and proceeded as follows):—A rule was granted to shew cause why the amendment should not be disallowed, and the verdict entered for the defendants as to both breaches, or also why the judgment should not be arrested. This rule has been argued before us, and we are clearly of opinion that the amendment should be disallowed. We think that the argument for the defendant is right, and that the claim for damages for the breach of the first covenant did not pass to the plaintiff by the conveyance of the land to him; that it was merely a chose in action which is not by law transferable, and that the agreement, as to ascertaining the amount, is incidental and annexed to the substantial thing, and is to be exercised by the person who was the owner of the land when the injury was done, and to whom the compensation ought to be made. If the injury had been repaired at the time of the conveyance to the plaintiff, it would have been done at the expense of the original lessors or grantors; if it had not, the plaintiff would have paid so much less upon his purchase. In any view the grantors are the persons entitled to the benefit consequent upon the breach of this covenant.

(*a*) *Horne's Case*, 2 H. 4, 6, pl. 5; *Sugden on Vendors and Purchasers*, 475, 13th ed.

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But even assuming this not to be so, we think that the amendment ought to be disallowed; no amendment ought to be made if it affords reasonable ground for a demurrer. The declaration as amended would, we think, to say the least, be subject to such objection, and it would not be right to make an amendment which would deprive a party of a fair demurrer, and drive him to a motion in arrest of judgment, or one non obstante veredicto. The doing so would most seriously affect his right to costs, and might lead to great abuse of a very valuable and most important privilege given by the late statutes. As to the second breach, we concur with the learned Serjeant that upon the evidence the pit-pans and levels were works within the meaning of the covenants.

The great point in the case, however, and the one which has been mainly argued before us, is that in arrest of judgment; and so far as we are aware it is new. It has been argued on the part of the defendant that by law the plaintiff could not have transferred to him the covenants upon which the breaches were assigned, for that they are not by law transferable, and that the original lessors or grantors are the only persons who can maintain an action upon them, and if this be so the judgment ought to be arrested. A very great number of cases were cited by the learned counsel on both sides, and various text books by most eminent authors adduced, but nothing directly upon the question appears to have been found, and we are therefore compelled to decide the point upon principle, and that which appears to us to be the true construction of the statute on which it depends, viz. 32 Hen. 8, c. 34; for it seems to be considered the better opinion that covenants do not run with the reversion at common law: 1 Saund. 210 *a*, note (*a*); 1 Smith's Leading Cases, 42. The right granted by the indenture on which the action is brought is

a right to dig for and carry away china clay, and to erect buildings and works incidental thereto upon certain defined lands. The nature of this right is clearly established by the cases of *Doe v. Wood* (*a*) and *Muskett v. Hill* (*b*). These cases establish that it is an incorporeal hereditament, a property, and an estate capable of being inherited by the heir, and assigned to a purchaser, or otherwise conveyed away. It is in truth "a tenement" within the definition of Lord Coke in the First Institute, 20 *a*, who says that the word "tenement" includeth not only corporate inheritances, but also all inheritances issuing out of them, or concerning or annexed to, or exerciseable within them, as rent, estovers, common, or other profits whatever, granted out of land." If therefore the original grantors, Messrs. Faris and Gill, had granted to any one the right to dig for and carry away the china clay, to him and his heirs for ever, they would have created an incorporeal hereditament, assignable for the whole estate, or for a particular one, and it would have been competent for the grantee to have granted to the defendant a lease of the right for twenty-one years, or any other number of years, or for life, or even an estate tail. Supposing, therefore, that the defendant in the present case had derived his title not directly from the owners of the land, but from a person, say A. B., to whom they had granted an estate in fee simple, of the right to dig for and take the china clay, and that the indenture had contained covenants such as those declared on; could the assignee of A. B. have maintained an action against the defendant, for breaches of the covenants committed during his time? This would depend upon two points. First, whether the covenants of themselves touched or concerned the thing demised; and secondly, whether they were by law capable of being assigned with the reversion. It has

(*a*) 2 B. & Ald. 724.

(*b*) 5 Bing. N. C. 694.

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long been settled that such covenants only pass to an assignee, as touch or concern the thing demised, and that the statute does not extend to collateral covenants : *Spencer's Case* (*a*). Some question might arise as to this point upon the first covenant, but on the second, which is now alone in controversy, it seems clearly to concern the thing demised, viz., to repair and yield up upon the determination of the term, the works erected by virtue of the licence and authority conferred by the indenture. This covenant directly touches and concerns the thing demised, and it would seem also to be assignable with the reversion. In the case of *Bally v. Wells* (*b*) an owner of tithes had demised them by a lease for six years, and the lessee had covenanted for himself and his assigns, not to let any of the farmers have any part of the tithes without the consent of the lessor. The lessee assigned his interest to the defendant, who let the tenants have the tithes without such consent, and thereupon the owner brought an action of covenant against him. A motion was made in arrest of judgment upon the ground that tithes were incorporeal, and that therefore the covenant could not run with them. Judgment was given for the plaintiff. It has always been considered that if the lessor could maintain covenant against the assignee of the lessee, the assignee of the lessor could maintain covenant against the lessee. The Court of Exchequer in Ireland also held that a lessor of tolls (an incorporeal hereditament) could maintain an action of covenant against the assignee of the lessee for the non-payment of rent : *The Earl of Egremont v. Keene* (*c*). But in truth it seems only necessary to refer to the statute itself. After reciting that by the common law no stranger to any covenant or condition could take any advantage or benefit

(*a*) 5 Rep. 16.

Wils. 25.

(*b*) Wilmot's Notes, 341; 3(*c*) 2 Jones, Ir. Ex. 307.

of it, but only parties, and privies, and certain mischiefs which had arisen, it enacts that "all persons, their heirs and assigns which shall have any gift or grant of the King of any lordship, manor, lands, *tenements*, rents, parsonages, tithes, portions, or other *hereditaments*, or of any reversion, or reversions of the same which did belong to any of the monasteries, &c., or to any other persons, and afterwards came to the King's hands, as also all other persons being grantees, or assignees, to, or by, the King, or to, or by any other person shall have like advantage against the lessees, by entry for non-payment of rent, or for doing of waste, or other forfeiture, and also shall have, and enjoy the same advantage, benefit, and remedy by action only, for not performing of other conditions, covenants, and agreements contained in the indentures of their leases, demises, or grants, against the lessees, and grantees, as the lessors or grantors themselves might have had." The statute in express terms therefore extends to incorporeal hereditaments and tenements, and is not confined merely to lands. If, therefore, there had been an estate in fee of the right or interest created by the indenture mentioned in the declaration, and the owner in fee of the right had demised it for twenty-one years, and there had been a covenant such as that secondly declared on, we should have been of opinion, that the assignee of the reversion could have sued upon it for a breach committed in his own time. But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorized and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate,

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but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licenses or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley* (a)); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease. In the ordinary case of owner in fee simple and tenant for years, in which the relation of reversioner and tenant within the statute certainly exists, the owner of the fee upon the determination of the term, has vested in him a larger and more extensive interest in the corpus of the land than the tenant for years had. His interest in the minerals and timber, and indeed in the soil itself, is very different from that of such tenant. We think that the statute enables us so to decide. The defendant is clearly liable to an action. The only difficulty is as to who is to be the plaintiff, and it is manifestly a great convenience that the action should be brought in the name of the person who is entitled to the benefit of the covenant, rather than in the name of the original grantors, who would, if they were the proper parties to sue, be mere trustees for the plaintiff, and not themselves entitled to any beneficial interest whatever. In the next statute for the amendment of the law, it would be well to prevent the occurrence of such a question hereafter.

(a) 3 M. &amp; G. 139.

It would only be necessary to extend to actions of covenant, similar provisions in the action of ejectment and actions upon policies of insurance.

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Rule absolute to enter a verdict for the defendant as to the first breach : discharged as to the residue.

## STIMSON v. HALL and Another.

Feb. 11.

**D**ECLARATION for freight and portage for the conveyance of goods; and for work done, &c.

Plea.—As to the sum of 47*l.* 0*s.* 6*d.* parcel, &c., the defendants, by way of defence on equitable grounds, say, that the plaintiff was and is a bargeman or lighterman, and was employed by the defendants in that capacity; that the plaintiff's claim in this action was and is for work done by him for the defendants as such bargeman or lighterman: that in the course of such work and employment the plaintiff agreed and undertook, to wit, for commission and reward in that behalf, to carry and convey on a certain river a large quantity, to wit, sixty-six tons of coal of the defendants in the barges or lighters of him the plaintiff: that the said coal was utterly lost in and on the said voyage by and through the negligence, unskillfulness, default, carelessness, wrongful and improper conduct of the plaintiff and his servants in that behalf, and not otherwise; and that the cost price of the coal so lost by the plaintiff amounted to a large sum of money, to wit, 47*l.* 0*s.* 6*d.*, then being a reasonable and ordinary price in that behalf;

To a declaration for freight and portage for the conveyance of goods, the defendants pleaded by way of equitable defence as to 47*l.* 0*s.* 6*d.*, parcel, &c., that the plaintiff's claim was for work done by him as a lighterman: that in the course of such employment the plaintiff agreed to convey on a certain river a quantity of coal of the defendants: that the coal was utterly lost through the negligence and improper conduct of the plaintiff, and that the cost price of the coal so lost was 47*l.* 0*s.* 6*d.*, which the defendants claim

equitably to set off against the sum pleaded to, and say that the said sums are equal in amount,—*Held*, that the subject-matter of the plea could not be pleaded by way of equitable defence, but merely afforded ground for a cross action.

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and the defendants claim equitably to set the said last mentioned sum off against the said sum, parcel, &c., by this plea pleaded to, and say that the said sums are equal in amount.

Demurrer and joinder therein.

*Sumner*, in support of the demurrer.—The plea sets up matter which is the subject of a cross action only. If this plea be allowed a defendant might plead by way of equitable defence, a claim for damages in an action for assault or breach of promise of marriage. There is no criterion by which the damages can be measured. In *Beasley v. Darcy* (*a*), a landlord, having brought ejectment for non-payment of rent, the tenant set off a claim for unliquidated damage: there, however, the relief was not immediate and unconditional; but on the defendants' claim being established upon an issue, and when the accounts were taken, it was ascertained that a half year's rent was not due at the time the ejectment was brought. An equitable defence, under the 17 & 18 Vict. c. 125, s. 83, must be of such a nature that a Court of law may give absolute and unconditional relief: *Mines Royal Societies v. Magnay* (*b*), *Wodehouse v. Farebrother* (*c*). Here the defendant has no equity as against the plaintiff, but merely a remedy at law. A court of equity will not in general grant an injunction if there is a complete remedy at law: *Wood v. Sutcliffe* (*d*).

The Court then called on

*Thrupp*, contrà.—A court of equity would in this case give the defendant relief against the judgment, not, indeed, unconditional, but of such a conditional nature that a

(*a*) 2 Scho. & Lef. 403, note.

(*c*) 5 E. & B. 277.

(*b*) 10 Exch. 489.

(*d*) 2 Sim. N. S. 163.

court of law could give effect to it. Courts of equity had jurisdiction in cases of cross demands before the statutes of set-off passed: *Ex parte Stephens* (*a*). Their jurisdiction is more ample than is given by those statutes. In *Freeman v. Lomas* (*b*) Sir G. Turner, V. C., points out that the equitable rule was founded on the Roman law: "Ideo compensatio necessaria est, quia interest nostra potius non solvere quam solutum repete." Dig. lib. xvi. tit. 2, s. 3. And in the comment on the word "interest," it is said, "Id est cum lis possit uno judicio definiri, scilicet, per actionem et exceptionem, pluralitas seu multitudo judiciorum non debet admitti; ut quae incommoda, sumptusque adferat; quinetiam compensationem sequitas poscere videatur: nam dolo facit qui petit quod restituturus est." In *Rawson v. Samuel* (*c*) Lord Cottenham, C., said, "We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversaries' demand." Here the equity is, that the defendant would be compelled to bring a cross action, and the plaintiff might become bankrupt, so that the defendant would have to pay the plaintiff, though he could recover nothing from him. Courts of equity have frequently relieved in cases like the present. In *Williams v. Davies* (*d*) an injunction was granted to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. Sir L. Shadwell, V. C., there said, "that it appeared to him that the case was the same as if the defendant's judgment had been paid, and he had been proceeding at law to take the plaintiff in equity in execu-

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(*a*) 11 Ves. 24.(*c*) 1 Cr. & Ph. 161, 178.(*b*) 9 Hare, 109.(*d*) 2 Sim. 461.

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tion ; that the judgment was in point of fact satisfied, and that although the Court of King's Bench would not, in point of form, allow the plaintiff's judgment to be set off against the defendant's, yet that it was right that it should be done in this Court." So where an action for mesne profits was brought against a party who had a cross action against the plaintiff for money expended on the land, the Court granted an injunction to restrain the proceedings at law: *Lord Cawdor v. Lewis* (*a*). In *Piggott v. Williams* (*b*) a solicitor filed a bill against his client to foreclose an estate pledged as a security for costs : the client filed a cross bill alleging that the costs were occasioned by the negligence of the attorney, and a demurrer to that bill was overruled on the ground of equitable set-off. Sir J. Leach, V. C., there said, "Taking the matter here charged to be true, the plaintiff has a clear title to restrain the defendant from proceeding to enforce his security against the copyhold estate, leaving the plaintiff's demand for damages unsatisfied." Again, in *Beasley v. Darcy* (*c*), a tenant having a claim against his landlord for unliquidated damages occasioned by cutting timber on the demised premises, the landlord brought an ejectment for nonpayment of rent. The tenant filed a bill stating his claim, and charging that if ascertained and credit given for it there would not be a year's rent in arrear, and on that fact being established on an issue, the tenant was restored to the possession (which the landlord had obtained in the mean time) on paying the balance due from him, and decreed him entitled to an account of mesne profits, &c. The doctrine of equitable set-off was also recognised in *Whyte v. O'Brien* (*d*). Though, in this case, the relief which a Court of equity would grant would not be unconditional, yet a court of law could carry it out;

(*a*) 1 Y. & C. 427.

(*b*) 6 Madd. 95.

(*c*) 2 Scho. & Lef. 403, note.

(*d*) 1 Sim. & Stu. 551.

therefore the reasons for the decisions in *Wodehouse v. Farebrother* (a) and *Mines Royal Societies v. Magnay* (b) do not apply. The cross claim for damages would be rendered certain by the trial of the issue, and when once ascertained, the judgment of the Court would do as complete and final justice between the parties as if the claim had been to set off a money demand.

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*Summer* was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment.

**BRAMWELL, B.**—I am of the same of opinion. It has been argued that the subject-matter of this plea affords a good equitable defence, and the civil law has been cited for the purpose of shewing that in the case of cross claims there is an equitable right of set-off. There may be a natural equity, and if so, a court of equity strictly so called would give effect to it. It is a common opinion that our courts of equity deal out justice without being governed by any rules, but in truth they are as much governed by rules as our courts of law. We are not to consider what is the natural equity or whether the case falls within the doctrine of the civil law, but whether, according to the known and ascertained rules, our courts of equity would, under the circumstances stated in this plea, have granted a perpetual injunction against the maintenance of this action. No doubt, where there is a transaction between two parties, and cross claims originate from it, a court of equity will in some cases interfere to prevent the one party from enforcing his claim without allowing the claim of the other. In *Beasley v. Darcy* (c) there was a clear equity: the tenant

(a) 5 E. & B. 277.

(b) 10 Exch. 489.

(c) 2 Scho. & Lef. 403, note.

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owed his landlord rent, and the latter had committed a trespass on the land which rendered it of less value, and prevented the tenant, to a certain extent, from getting the rent out of it. The Court in effect say: "You shall not take advantage of the forfeiture, because you have rendered the land of less value by your wrongful act." That was one transaction: there is nothing of the sort here, for though the plea states that the loss occurred in the course of the employment, there is no natural connection between the claim and the cross claim. In my opinion there is no ground whatever for this plea, and there is no semblance of authority in favour of it.

WATSON, B.—I am of the same opinion. The action is for freight and portage for the conveyance of goods: the defendant pleads that in the course of that employment he became entitled to damages in consequence of the breach of duty of the plaintiff, and that he has an equitable right to set them off against the plaintiff's claim. Before we can decide that the defendant is entitled to plead this equitable defence, he must shew by the authorities that there is an equity, that is, that a court of equity would, under the circumstances, grant a perpetual injunction. He has failed to do so. In all the cases referred to, with the exception of *Williams v. Davies* (a), there was some equitable ground for relief, and the answer to that case is, that Lord Cottenham, in his judgment in *Ranson v. Samuel* (b), does not give implicit faith to the correctness of the decision. In *Beasley v. Darcy* (c) there was a clear equity. Here the defendant has a mere right of action for damages, and a court of equity would not interfere to restrain the plaintiff's action.

Judgment for the plaintiff.

(a) 2 Sim. 461.

(b) 1 Cr. & Ph. 161.

(c) 2 Scho. & Lef. 403, note.

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PIGOT v. CADMAN.

Feb. 12.

ACTION to recover the amount of an attorney's bill.—
Pleas: never indebted, and that no signed bill had been delivered as required by the 6 & 7 Vict. c. 73, s. 37.

At the trial before *Bramwell*, B., at the last Liverpool Summer Assizes, it appeared that the bill on which the action was brought was properly signed, and had been duly delivered to the defendant a month before the action was commenced. The bill contained items which represented three separate transactions, in which the plaintiff had been employed, the first being for advice given to the defendant in respect of his liability upon a promissory note to which he was a party, the second for attendances before magistrates to defend a third person, but which attendances were said to have been made on the retainer of the defendant, and the third for journeys, consultations, &c., in respect of an alleged liability of the defendant as a partner in a certain mine. After the commencement of the suit, the defendant had by Judge's order required the plaintiff to state whether he had any other claims against the defendant than those sought to be recovered in the action; and the plaintiff had in obedience to that order delivered two other bills for work alleged to have been done by the plaintiff for the defendant, before the date of the delivery to the defendant of the bill on which this action was founded. It further appeared that there had been a suit in Chancery, to which the defendant was a party, with respect to the mine above mentioned, and that all of the items contained under the third division of the bill sued on were extra costs incurred in that Chancery

An attorney's bill which contains, amongst other items, certain extra costs, not mentioning the taxed costs, is bad within the 6 & 7 Vict. c. 73, s. 37, even though, in an action on the bill, the jury find that the attorney has no claim for extra costs.

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suit, and which had not been allowed on taxation in the suit in Chancery. The defendant admitted a retainer for the work contained under the first division of the bill; denied that the work contained in the second division was done upon his retainer; and alleged that, for the work in the third division, the defendant had agreed to look to the profits of the mine for payment. The jury found for the defendant for all but the first division.

It was however contended on behalf of the defendant that he was entitled to a verdict on the whole case on the second issue, on the ground that the delivery of such a bill was not a compliance with the statute, because it did not contain the whole of the plaintiff's then existing *claim* against the defendant as his attorney; and because the items respecting extra costs were insufficiently stated for the purpose of taxation, being stated without the items of taxed costs to which they were extra. As to this last point, it was said that the proper course for the plaintiff was to have delivered a bill of all the costs, those allowed in taxation as well as the extra costs, and then to have given credit for those which had been allowed. A verdict was entered for the plaintiff for the amount claimed under the first division of his bill, leave being reserved to the defendant to enter a verdict for him upon the second issue, if the objections to the bill should be held to be valid.

A rule nisi having been obtained accordingly.

*Milward shewed cause* (Feb. 7).—The bill is good as regards the extra costs. It was useless to include items which had been already allowed on taxation. At all events, the objection is cured by the finding of the jury that the defendant is not liable for the extra costs. The insertion of charges which the plaintiff had no right to make cannot

render the bill bad.—He also argued that the plaintiff was not bound to include his whole claim in one bill : on this point he referred to *Becke v. Penn* (*a*), and *Cook v. Gillard* (*b*). *Bramwell*, B., referred to *Thwaites v. Mackerson* (*c*).

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*Edward James and Brett*, in support of the rule.—The statement in the bill of extra costs, without giving the items of taxed costs, renders the bill bad. Unless the taxed costs are included in the bill, the defendant's legal adviser cannot tell whether he ought to recommend him to refer it for taxation, neither can the taxing officer come to a right conclusion as to what he should allow or disallow. The question whether or no the bill is good cannot depend on the finding of the jury. The statute requires that the attorney shall deliver a bill of the costs which he claims before he brings an action. *Waller v. Lacy* (*d*) is an express authority that a bill for extra costs, omitting the taxed costs, is bad.—(They also argued that an attorney could split his demand and deliver several bills in respect of it : on this point they referred to *Hill v. Humphreys* (*e*), *Benton v. Garcia* (*f*), *Ivimey v. Marks* (*g*) ; but as the judgment of the Court did not proceed on that ground the arguments are omitted.)

The judgment of the Court was now delivered by

**BRAMWELL, B.**—We are of opinion this rule should be made absolute.

The facts on which we form this opinion may be shortly stated. The plaintiff brought an action to recover for work

(*a*) 7 C. & P. 397.

(*b*) 1 E. & B. 26.

(*c*) 1 Moo. & M. 199.

(*d*) 1 Man. & G. 54.

(*e*) 2 Bos. & P. 343.

(*f*) 3 Esp. 149.

(*g*) 16 M. & W. 843.

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and disbursements as an attorney. He delivered bill a month before action. In it he claimed extra costs, which he mentioned in detail, not giving items of the taxed costs. The other items of the bill were properly stated. The jury found the defendant liable for a portion of the latter items, but for the work as to the extra costs are charged, they found the defendant liable.

The case is concluded by the authorities. *Waller v. Lacy* (a), is in point to shew, that as to the extra cost bill was not a bill within the statute. We are bound to that decision, however we may agree with the remark in *Cook v. Gillard* (b) "that it would be better to require demand of further information so that a bill might be corrected before action." Then *Irviney v. Marks* (c) is in point that this bill is altogether bad. The proposition there laid down, at least where an attorney blends several claims in one bill, "that as the client is entitled to have his whole bill taxed, if the attorney does not deliver a sufficient bill as to the whole, it is the same as if he had delivered no bill at all."

Then does it make any difference that the jury in fact found the defendant not liable for the extra costs? We think not. The question arose before and independently of the finding. The bill might have been referred to taxation with a reservation of the question of the defendant's liability, and if bad at that time, it continues bad. The case may be tested, as was argued in *Waller v. Lacy*, by the pleadings. The defendant pleads that the action is for work as an attorney, and that there is no signed bill of the work the plaintiff is seeking to recover; that is, the whole of the work he is so seeking. The plaintiff replies,

(a) 1 M. & G. 54.

(b) 1 E. & B. 26.  
 (c) 16 M. & W. 843.

there is: but it turns out there is not. And this is strictly and verbally in conformity with the statute, 6 & 7 Vict. c. 73, s. 37, which says: "No attorney shall commence or maintain an action for fees, &c., till one month after he shall have delivered a bill of *such fees, &c.*" Such as what? Why those for which he has commenced his action. Assuming therefore an attorney may deliver a bill for particular work, and maintain an action for it, though other money is due to him for other work, for which no bill is delivered, and for which the action is not commenced, as to which we say nothing, it appears to us that *Ivimey v. Marks* and the words of the statute alike shew, that if the bill is bad in part, though that part be an unsustainable claim, it is bad altogether. No doubt *Waller v. Lacy* is to the contrary, but the point there was given up on the authority of *Drew v. Clifford* (a) and *Ivimey v. Marks* is a more recent decision; and though it does not satisfactorily distinguish *Waller v. Lacy* (for in *Waller v. Lacy* the plaintiff recovered for *taxable items*), we must consider ourselves bound by it, more especially as our own opinions go along with the reasoning in *Ivimey v. Marks*.

Rule absolute.

(a) Ry. & M. 280.

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## POCHIN v. DUNCOMBE.

In 1766 an Act was passed for allotting, dividing, inclosing, and draining fens within the manor and parish of Bourn. It recited, amongst other things, that there were within the manor certain open fields and certain large fens, that the Earl of Exeter was lord paramount of the manor of Bourn, and a considerable proprietor of lands in the fields, &c., and also of several commonable cottages within the said manor, that G. Pochin was lord of the manor of Bourn Abbotts, being a distinct manor with the said manor of Bourn; and also a proprietor of lands and of commonable cottages within the said manor, and that divers other persons were owners and proprietors of the residue of the lands and commonable cottages within the said manor; and that the said Earl and G. Pochin, as lords of the manor, were owners of the soil of the said several fields, fens, and commons, and the said several proprietors were entitled to the herbage thereof: that the owners and proprietors of the said common fens were desirous that the same should be divided and inclosed and allotted to the several owners and proprietors thereof, and to the persons having right of common and other interest therein, in lieu of, and in proportion to their several respective interests and right of common. By sect. 6 it was enacted, that the commissioners "shall set out and allot the fields and meadows in manner therein mentioned, that is to say, to the Earl as lord paramount three acres, as a compensation for his right to the waste in the fields and hamlets in the parish of Bourn; and the residue of the fields and meadows amongst the persons entitled to lands, property, and right of common therein: and shall also set out and allot the fens, in the first place twenty acres to the lords of the said manors, in lieu of their broughage and rights to the wastes and soil in the said fens: viz., ten acres to the said Earl as lord paramount, five acres to the said Earl as lord of the copyhold manor of Bourn, and the remaining five acres to Pochin as lord of the manor of Bourn Abbotts; and shall also set out a copasture to be enjoyed by the owners of commonable houses, &c., and the same shall for ever thereafter go along and be of the same tenure with such houses, &c.; and shall set out and allot unto and amongst the proprietors of commonable houses six acres, &c., quantity and quality considered, which shall be in lieu of and as a compensation for their right and property in the said fens as proprietors of the said houses, &c.; and shall also set out and allot the residue, &c., unto and amongst Sir J. H. and the several other proprietors of fields, meadows and ancient enclosures within the said parish having right of common in proportion to the several estates and properties which they have therein respectively." Section 10 provided, that in case any of the proprietors of allotments, to be made by virtue of this Act in the said common fens, in lieu of copyhold estates, shall desire to have their allotments enfranchised, it shall be lawful for the commissioners to allot a quantity of land, equal to two-thirteenth parts of such allotments respectively, to the lord of the manor; and that such allotments, in lieu of copyhold interest, shall for ever, after the executing the award, be deemed freehold. The Act contained a saving of the rights of the lords of the manor. The commissioners in pursuance of the Act allotted to the lords certain lands as a compensation for their broughage and right to the wastes and soil in the fens. They also allotted certain lands to the owners of commonable houses, &c., and of enclosures being copyholds within the manor. The commissioners allotted these lands as copyhold, and from the time of the passing of the act fines had constantly been paid to the lord on the admission of tenants to such allotments.—*Held*, that allotments so made in respect of copyhold tenements within the manor, not having been enfranchised under the provisions of the 10th section, were of copyhold tenure.

By an inclosure Act, passed in 1766, the commissioners were to allot a copasture, to be enjoyed by the owners of commonable houses, and to be used as a copasture only from May Day to Martinmas, and from Martinmas to Lady Day, "and it was provided the same should for ever thereafter remain, go along with and be of the same tenure with such houses, &c., but should not be subject or liable to any fee or fine whatsoever to the lord." The commissioners made their award and set out the copasture. By an Act passed in 1772, for the purpose of dividing the copasture, it was enacted, that the commissioners, after making certain other allotments, should set out the residue of the copasture unto and amongst all and every the proprietors of commonable houses, &c.; "and that all the allotments which should be made of

of the Manor of Bourn Abbotts, was indebted to the plaintiff, the lord of the said manor, in 1000*l.*, for certain reasonable fines duly assessed, due and payable from the defendant, according to the custom of the said manor, on the admission of the defendant into the said copyhold tenements with the appurtenances, to which said tenements the defendant was admitted while the plaintiff was such lord as aforesaid. Plea.—Never Indebted. Whereupon issue was joined.

The cause came on for trial before the Lord Chief Baron, when a verdict was taken for the plaintiff, subject to the following special case. The Court to be at liberty to draw such conclusions of fact as a jury ought to draw under the circumstances. If the Court shall be of opinion that the fines or any of them are payable, then the verdict is to stand for such sum as the Court shall direct, but if the Court shall be of opinion that none of the said fines are payable, then the verdict is to be entered for the defendant.

The parish of Bourn, in the county of Lincoln, contains a manor, called the Manor of Bourn, or the Manor of Bourn with the members, and another manor, called the Manor of Bourn Abbotts, or the Manor of Bourn Abbotts with the members, which is a distinct manor within the Manor of Bourn.

The plaintiff is lord of the manor of Bourn Abbotts, and the action is brought to recover five fines in respect of five allotments in the North Fen, and nine fines in respect of nine allotments in the South Fen.

(The questions as to the allotments in the several fens being distinct, it was arranged that they should be argued separately.)

the said cowpasture, should for ever thereafter remain and be of the same tenure with such houses, &c." The cowpasture was divided and allotted under the Act of 1772, to the owners of commonable houses.—*Held*, that the provision in the Act of 1766, that such parts of the cowpasture as were copyhold should be held without payment of fines to the lord, exempted the owners of the copyhold tenements in the cowpasture, when divided and held in severality, from payment of fines to the lord.

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*As to the Fines in respect of the Allotments in the North Fen.*

In the year 1766 an act of parliament was passed, intituled "an Act for allotting, dividing, enclosing and draining several open and common fields, meadows, waste and fen grounds within the manor and parish of Bourn in the county of Lincoln."

The recitals in the said Act are true (*a*).

(*a*) The recitals are as follows : "Whereas the lands and grounds of the several owners and proprietors in the open fields and meadows in the manor and parish of Bourn, and in the hamlets of Dyke and Cawthorpe within the said parish of Bourn, &c., lie intermixed and dispersed in small parcels, and therefore are not at present capable of any considerable improvement: And whereas there are within the said manor and parish certain large common fens, called the North Fen, the South Fen, and Dyke Fen, containing together about 4440 acres, which are frequently overflowed with water, and are but of little use to those who have right of common thereupon: And whereas the Right Honourable Brownlow, Earl of Exeter, is Lord Paramount of the said manor, and a considerable proprietor of lands and grounds in the said fields and meadows, and of several commonable cottages and toftsteads within the said manor and parish; George Pochin, Esq., is lord of the manor of Bourn Abbotts, with the members, being a distinct manor within the said manor of Bourn; and also a proprietor of

lands and ground and of several commonable cottages and toftsteads within the said manor and parish; Thomas Trollope Brown is impropriator, &c. \* \* Sir Gilbert Heathcote, Bart., is owner and proprietor of a commonable cottage and of several ancient inclosures, &c., within the said manors and parish, and Theophilus Buckworth, &c., together with divers other persons, are owners or proprietors of the residue of the lands and commonable cottages and toftsteads within the said manors and parish; and the said Earl and George Pochin, Esq., as lords of the said manors, are owners of the soil of the said several fields, fens, and commons, and the said several proprietors are entitled to the herbage thereof: And whereas, the owners and proprietors of the said fields, meadows, and common fens are desirous that the same may be divided and inclosed, and that specific parts and shares thereof may be allotted to the several owners and proprietors thereof, and persons having right of common and other interest therein, in lieu of and in proportion to their several and respective interests and right of common.

The commissioners acting in execution of the said Act, on the 2nd of January, 1770, made their award in pursuance of the Act.

\* \* \* But although such division and inclosure will tend to the advantage of the parties concerned, yet the same cannot be established without the authority of parliament."

Section 6 enacts, "That the commissioners, &c., shall, and they are hereby authorized, &c., to set out and allot the said *fields or meadows*, in manner herein-after mentioned, that is to say, in the first place, they shall set out and allot unto the Right Honourable the Earl of Exeter as Lord Paramount, such quantity of land not exceeding three acres, &c., in lieu of and as compensation for his lordship's right to the several wastes in the fields and hamlets of the said parish of Bourn. \* \* \* And shall also set out and allot the residue of the said fields and meadows unto and among the several persons who at the time of making such division shall be entitled to lands, property, and right of common therein, in proportion to their several and respective shares, interests, and rights of common, &c. And shall also set out, divide, and allot the said *common fens*, in manner hereinafter mentioned, that is to say, in the first place, they shall set out and allot twenty acres to the lords of the said manors, *in lieu of their brouage and rights to the wastes and soil in the said fens*, in the proportions following, viz.: ten acres to the Right Honourable

the Earl of Exeter as Lord Paramount of the said manor, five acres to the said Earl as lord of the copyhold manor of Bourn aforesaid, and the remaining five acres to George Pochin, Esq., as lord of the said manor of Bourn Abbotts within the said manor of Bourn \* \* \* And shall also set out and allot such parcel or parcels of land in the said fens, to be used and enjoyed as a cow-pasture or cowpastures by the owners of commonable houses and toftsteads in the towns of Bourn, Dyke and Cawthorpe, as shall be equal to two cows for each commonable house and toftstead in the said towns, so as the same do not exceed three acres, quantity and quality considered, to each such house or toftstead, to be used and enjoyed as a cow-pasture only, from May Day to Martinmas yearly, and from Martinmas until Lady Day yearly; the same may be depastured with sheep by the owners of such commonable houses and toftsteads, so as the same do not exceed three sheep to each such house or toftstead, and the same shall for ever thereafter remain, go along and be of the same tenure with such houses and toftsteads respectively; but shall not, any of them, be subject or liable to any fee or fine whatsoever to the lords of the said manors or either of them. And the said commissioners, &c., shall also set out and allot in such part of the said fens as they, &c.,

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By the award, the commissioners (amongst other things), allotted and assigned three acres to the Earl of Exeter, as lord paramount of the manor of Bourn, in lieu of and as a compensation for his lordship's right to the

shall think proper, unto and for each and singular the proprietors of commonable houses and toftsteads within the said parish of Bourn, six acres and a half of an acre, quantity and quality considered, which shall be in lieu of and as a compensation for their right and property in the said fens as proprietors of the said houses and toftsteads. And shall also set out and allot the residue of the said common fens unto and amongst the said Sir Gilbert Heathcote, in respect of his said cottage and pastures, and the several other proprietors of field or meadow lands and ancient inclosures within the said parish, having right of common as aforesaid, in proportion to the several estates and properties which they have therein respectively," &c.

Section 9 enacts: "That the several lands and grounds to be assigned, set out, allotted, and appointed unto and for the several persons who shall be entitled to the same, shall be and are hereby vested in them respectively, in full bar of and satisfaction and compensation for his, her, or their several pieces and parcels of ground, which he, she, and they respectively held before the passing of this Act, or immediately before the said allotments were made, and which now are dispersed in the said fields and meadows intended to be enclosed; and also in full bar, satisfaction, and compensation of and

for all right of common and other right whatsoever in, over, and upon the same; and also in, over, and upon the said fields, meadows, and common fens; and that from and immediately after the making of the division and allotments and the execution of the said award, &c., all right of common belonging to or claimed by all and every the owners, proprietors, or occupiers of lands, tenements, or other hereditaments, and of all other persons whatsoever in, over, and upon the said lands and grounds intended to be enclosed as aforesaid and every part thereof, and also all tithes, both great and small, and all other payments whatsoever (mortuaries and surplus fees excepted, and which shall still remain payable and be paid in such and the same manner as they would have been in case this Act had not been made) shall cease, determine, and be for ever extinguished."

By section 10. "In case any of the proprietors of allotments to be made by virtue of this Act in the said common fens, in lieu of copyhold estates, shall desire to have such their allotments enfranchised, and shall signify such their desire in writing to the said commissioners at any of their meetings before the making of the allotments of the said fens, it shall and may be lawful for the said commissioners, &c., to allot a quantity of land equal to two-thirteenth parts of such allot-

several wastes in the fields and hamlets of Bourn; ten acres in the North Fen to the said Earl, as lord para-

ments respectively, and add the same to the other shares or allotments by this Act directed to be made, to the lord or lords of the manor under which such copyholds are held respectively; and that such allotments, in lieu of copyhold interest, shall for ever, after the executing of the said award, be deemed freehold, and shall and may be held as such."

Section 11. "The commissioners in making such allotments shall have due regard to the quality as well as quantity of the lands, and right of common and other property belonging to each person interested, and the quantity, quality, and situation of the lands and grounds to be allotted in lieu thereof," &c.

Section 21. "It shall and may be lawful to and for all or any of the proprietors and owners of lands and grounds within the said parish, to exchange all or any of his, her or their messuages, tenements, old inclosures, or other lands and grounds within the said parish for any other messuages, tenements, old enclosures, or other lands and grounds within the said parish, &c., such exchange, &c., to be specified and declared in the award," &c.

Section 22. "The lands which shall be allotted in the said *fields and meadows*, and the messuages, tenements, and lands to be exchanged by virtue of this Act, in lieu or in respect of any lands in the said fields and meadows, or of any messuages or tenements,

which before such division or exchanges respectively were leasehold or copyhold, shall, from and for ever after the execution of the said award, be deemed to be leasehold or copyhold, though the same were before freehold; and shall be held for the same estates, terms of years and interests, and at and for the same yearly and other rents and heriots, customs and services, and subject to and under the same provisoos, conditions and agreements, except any right of common upon the lands hereby intended to be inclosed, as the messuages, tenements and lands granted in and by the said leases or copyhold grants respectively, are thereby respectively holden; and that the lands in the said fields and meadows and the messuages and tenements which are leasehold or copyhold, and which shall be allotted or exchanged by virtue of this Act, in lieu or in respect of any lands in the said fields or meadows, or of any messuages or tenements which are freehold, shall, from and for ever after the execution of such award, be deemed to be freehold and held as such, though the same were before leasehold or copyhold."

By section 37, for making the award, the several allotments, divisions, &c., and "all orders, directions, regulations, and determinations so to be made as aforesaid, in and by such award, shall be binding and conclusive unto and upon all parties interested."

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mount of the manor of Bourn; five acres in the North Fen to the said Earl, as lord of the manor of Bourn, which said two last mentioned pieces of land are stated in the said award to be allotted to the said Earl in lieu of his brovage and right to the wastes and soil in the fens, and the commissioners also allotted and assigned five acres in the North Fen to G. Pochin, Esq., as lord of the manor of Bourn Abbotts, which last mentioned parcel is stated, in the award, to be allotted to the said G. Pochin

Section 42. "Nothing in this Act contained shall extend, &c., to revoke, make void, alter or annul any will, settlement, mortgage, &c., or to prejudice any person having any right or claim of dower, jointure, portion, debt, rent, mortgage, incumbrance, or other demand out of, upon or affecting any messuages, tenements, lands, or grounds that shall be exchanged, by virtue of this Act, or any part or parts thereof respectively (other than, &c.); but that each and every proprietor shall stand and be seised of and in the messuages, tenements, lands and grounds to be received in exchange by, or assigned, or allotted to him, her or them, &c., to such and the same uses and for such estates and interests, and subject to such wills, powers, &c., and demands (other than, &c.), as he, &c. was seised of and in his messuages &c. and common right before the making of such division, allotments or exchanges respectively, and in such manner as he, she or they would have been in case this Act had not been made anything herein contained to the contrary thereof notwithstanding."

Section 47. "Nothing in this

Act contained shall prejudice, lessen, or defeat the right, title or interest of any lord of any manor, &c., within the jurisdiction or limits whereof the said fields, meadows and common fens hereby directed to be inclosed, &c., are lying and being, of, in and to the seigniory or royalties incident to or belonging to such manor &c.; but that such lord or lords, for the time being, and all and every other person or persons claiming under him or them as lord or lords of the said manors, &c., shall and may from time to time and at all times hereafter, hold and enjoy all rents, services, courts, perquisites and profits of courts, and all other royalties and privileges to the said manors, &c.; or to the lord or lords thereof or any claiming under him or them, incident or appendant, belonging or appertaining (other than those meant or intended to be barred and destroyed by this Act) in as full, ample and beneficial manner to all intents and purposes as they ought or might have held or enjoyed the same before the passing of this Act, or in case the same had never been made."

in lieu of his brovage and right to the wastes and soil in the fens.

No allotment was expressed to be made to either of the lords, as lords, except as aforesaid.

Amongst the allotments of the general residue of the lands directed to be enclosed are twenty-three other parcels allotted to the Earl of Exeter, of which seventeen are in the fields and meadows, and two in the South Fen, three in the North Fen, and one in the East Gate or Bead House Bank, but the award contains no declaration as to the property in respect of which such allotments were made.

In like manner nineteen other parcels are allotted to G. Pochin in the fields, meadows and fens, without any special declaration except as to two of them (Nos. 19 and 20) in the West Field, containing, together, forty-six acres, which are declared to be copyhold of the manor of Bourn, and in lieu of all his copyhold lands in the fields and meadows holden of that manor.

Numerous other allotments are made by the award, and amongst them are the five allotments in the North fen, in respect of which fines are claimed in this action.

The following are extracts from the award relating to the said five allotments.—

"We have set out and do hereby allot and assign unto Mary Berney, Widow, her heirs and assigns, one parcel of land in the North Fen, containing 5 a. 1 r. 32 p., (describing the same by boundaries), which said parcel of land is allotted to the said Mary Berney as copyhold, in respect of her commonable house held by copy of Court Roll, of the Manor of Bourn Abbotts."

Mary Berney,  
Copyhold,  
Bourn Abbotts,  
in Fen.

"We have set out, and do hereby allot and assign unto Ann Hyde one parcel of land in the North Fen, containing 15 a. 1 r. 18. p.," describing the same by boundaries.

Ann Hyde,  
3 Co. Bourn  
Abbotts.

"We have set out, and do hereby allot and assign unto the said Ann Hyde one other parcel of land (No. 7) in the

7 Co. Bourn  
Abbotts.

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John Willey,  
 4 Co. Bourn  
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North Fen, containing 6 a. 3 r. 3 p.," (describing the same by boundaries.)

The following passage is then contained in the award relative to the allotments to Ann Hyde.—

"Which said parcel (No. 3) is allotted to Ann Hyde as copyhold of the said manor of Bourn Abbotts, in right of her commonable house held of that manor."

"The said parcel (No. 7) is allotted to the said Ann Hyde as proprietor of the same commonable house out of the residue of the said fens, in respect of her other lands in the manor of Bourn Abbotts, in lieu of which lands the parcel (No. 8) is set out as copyhold in that manor."

"We have also set out, and do hereby allot and assign unto John Skelton, his heirs and assigns, one other parcel of land (No. 7) in the North Fen, containing 31 acres and 2 roods," (describing the same by boundaries.)

Then comes the following passage relative to the various allotments to John Skelton.—

"The said parcel of land (No. 1) is allotted to the said John Skelton as freehold in right of his commonable house being freehold, &c., and the said parcel (No. 7) is allotted to him in respect of his commonable houses, and all the lands and other property being copyhold held of the manor of Bourn Abbotts."

"We have also set out, and do hereby allot and assign unto John Willey, his heirs and assigns, one other parcel of land (No. 4) in the North Fen, containing three roods and twenty-six perches," (describing the same by boundaries.)

The following passage is then contained in the award relating to the allotments to John Willey.—

"The said fourth parcel is allotted to the said John Willey out of the residue of the said fens, as proprietor of the said commonable toftsteads, in respect of his copyhold lands in the manor of Bourn Abbotts."

The award contains the following general declarations.

"And we do hereby order that the several lands, &c., allotted, &c., shall be in full bar of satisfaction and compensation for all manner of lands, interest, common rights and properties whatsoever, in, over and upon the said fields, meadows and common fens, and of and for all great and small tithes and other dues as aforesaid, except as aforesaid, in respect of all or any of the said lands so divided and directed to be enclosed, and that all right of common and common of pasture shall, immediately after the execution of these presents, cease, determine and be for ever extinguished."

"And with respect to the shares or allotments to which certain copyholders of the manors of Bourn and Bourn Abbots were, in right of their copyhold estates, entitled to in the said fens, the said copyholders having, at some of our meetings previous to the setting out the lands, &c., signified their desire to have their allotments enfranchised : We have, accordingly, deducted two thirteenth parts of such allotments, and added the same to the allotments by the Act directed to be made to the lord of the manor under which such copyholds are held, and have allotted the remaining eleven parts only to the said copyholders : and to prevent mistakes as much as possible, we do hereby declare that where the allotment of any proprietor in the said fens is in the margin of this award specified to be freehold, and no declaration follows the description thereof, either immediately or at the end of all the allotments of that proprietor, such allotment is made in lieu of copyhold interest, and contains only the eleven thirteenth parts to which such proprietor was entitled upon the division of the said fens ; and that where any allotments have been made in lieu of freehold interest, or copyhold interest not enfranchised, the tenure of the houses, tofts, steads, or lands by virtue of which the owners of such allotments were entitled thereto, is particularly and fully set forth in a

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declaration following the descriptions of all the allotments of such proprietors."

The award contains ninety-three allotments in the fens, which allotments have the word "freehold" written against them in the margin of the said award, without any declaration relating to the tenure of those allotments following the description thereof, either immediately or at the end of such allotments, with the exception of two allotments to one proprietor, Mary Shippey, as to which, in addition to the word "freehold" in the margin, there is the following declaration:—"Which said two parcels of land (Nos. 1 and 2) are allotted to the said Mary Shippey as freehold for the eleven thirteenth parts of her share of the said fens in right of her commonable house and lands being copyhold."

Some of the allotments in the fens are, in the award, declared to be allotted as freehold in respect of freeholds, and others, being allotments in respect of copyholds, are comprised in the before mentioned class of allotments.

There are twenty-three allotments in the North Fen and Dyke Fen (including the five allotments in question in this action), which, as appears from the award, were allotted in respect of copyholds, and which have neither freehold written in the margin nor any declaration to the effect that they are allotted as freehold, but which are either stated to be allotted as copyhold or in respect of copyhold property, and which do not appear in the award to have been enfranchised under the Act.

The said five allotments in the North Fen, in respect of which fines are claimed in this action, were, in fact, so allotted in respect of copyhold tenements, parcels, and holden of the manor of Bourn Abbotts, and the rest of the said twenty-three allotments in the fens were, in fact, allotted in respect of copyhold tenements, parcels, and holden of one or other of the said manors. The allotments

were not made in lieu of or in exchange for any copyhold tenements, but in respect of the commonable rights belonging to the respective tenements in respect of which they were allotted.

The copyholds are copyholds of inheritance, and on an admission a fine is, by the custom, payable to the lord by the party admitted, except so far as such custom may be affected by the acts of parliament. The amount of fine so payable is, by the custom, at the will of the lord.

From the time of the making of the award, down to the year 1851, the said twenty-three allotments in the North Fen and Dyke Fen, which include the five in question in this action, were always treated as copyholds, and numerous admissions were made thereto, and on every admission a fine was, by the party admitted, paid to the lord of that manor whereof the tenement was parcel and holden, in respect of which tenement such allotment is in the said award expressed to have been made.

Previously to the year 1811 the five allotments in the North Fen became vested in the late J. Digby, who was admitted tenant thereto, respectively, by six separate admissions (the admission to one of the said allotments being in separate moieties), and paid separate fines and fees on each admission, from whom the allotment by divers mesne conveyances and descents came to the defendant, who entered into possession of the five allotments, and was admitted tenant thereof; and thereupon the plaintiff assessed a fine on the admission of the defendant to each allotment, which fines, if any fines were assessable and payable, were duly assessed and demanded.

The defendant has refused to pay the said fines or any of them. He contends that the said five allotments in the North Fen are of freehold tenure, and if the Court shall be of opinion that, upon the true

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*As to the Fines in respect of the Allotments in the North Fen.*

In the year 1766 an act of parliament was passed, intituled "an Act for allotting, dividing, enclosing and draining several open and common fields, meadows, waste and fen grounds within the manor and parish of Bourn in the county of Lincoln."

The recitals in the said Act are true (a).

(a) The recitals are as follows : "Whereas the lands and grounds of the several owners and proprietors in the open fields and meadows in the manor and parish of Bourn, and in the hamlets of Dyke and Cawthorpe within the said parish of Bourn, &c., lie intermixed and dispersed in small parcels, and therefore are not at present capable of any considerable improvement: And whereas there are within the said manor and parish certain large common fens, called the North Fen, the South Fen, and Dyke Fen, containing together about 4440 acres, which are frequently overflowed with water, and are but of little use to those who have right of common thereupon: And whereas the Right Honourable Brownlow, Earl of Exeter, is Lord Paramount of the said manor, and a considerable proprietor of lands and grounds in the said fields and meadows, and of several commonable cottages and toftsteads within the said manor and parish; George Pochin, Esq., is lord of the manor of Bourn Abbotts, with the members, being a distinct manor within the said manor of Bourn; and also a proprietor of

lands and ground and of several commonable cottages and toftsteads within the said manor and parish; Thomas Trollope Brown is impropiator, &c. \* \* Sir Gilbert Heathcote, Bart., is owner and proprietor of a commonable cottage and of several ancient inclosures, &c., within the said manors and parish, and Theophilus Buckworth, &c., together with divers other persons, are owners or proprietors of the residue of the lands and commonable cottages and toftsteads within the said manors and parish; and the said Earl and George Pochin, Esq., as lords of the said manors, are owners of the soil of the said several fields, fens, and commons, and the said several proprietors are entitled to the herbage thereof: And whereas, the owners and proprietors of the said fields, meadows, and common fens are desirous that the same may be divided and inclosed, and that specific parts and shares thereof may be allotted to the several owners and proprietors thereof, and persons having right of common and other interest therein, in lieu of and in proportion to their several and respective interests and right of common.

each such house or toftstead, "and the same shall for ever thereafter, remain, go along and be of the same tenure with such houses and toftsteads respectively, but shall not any of them be subject or liable to any fee or fine whatsoever to the lords of the said manor or either of them." Such cowpasture therefore is made copyhold without fine. The Act then proceeds to enact, that the commissioners "shall also set out and allot, in such part of the said fens as they shall think proper, unto and for each and singular the proprietors of commonable houses and toftsteads within the said parish of Bourn, six acres and a half an acre, quantity and quality considered, which shall be in lieu of and as a compensation for their right and property in the said fens, as proprietors of the said houses and toftsteads, and shall also set out to Sir Gilbert Heathcote, &c., and the several other proprietors of field or meadow lands and ancient inclosures, within the said parish, having right of common, in proportion to the several estates and properties which they shall have therein respectively." This clause must be read in connection with the 10th, which provides that, where the proprietors of allotments in the fen, made in lieu of copyhold estates, shall desire to have their allotments enfranchised, it shall be lawful for the commissioners to allot two thirteenths to the lords under which such copyholds are held, and such allotments, in lieu of copyhold interest, shall for ever after be deemed freehold. The intention was that all the allotments, other than the cowpasture made in respect of copyhold houses or land, should be of the nature of copyhold, unless, before the award, the owners signified their desire to have them enfranchised. Where not enfranchised, the allotments became new copyholds. If this construction of the Act is not adopted, the lords will lose the benefit of the interest they possessed where before the enclosure the right of common was appurtenant

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By the award, the commissioners (amongst other things), allotted and assigned three acres to the Earl of Exeter, as lord paramount of the manor of Bourn, in lieu of and as a compensation for his lordship's right to the

shall think proper, unto and for each and singular the proprietors of commonable houses and toftsteads within the said parish of Bourn, six acres and a half of an acre, quantity and quality considered, which shall be in lieu of and as a compensation for their right and property in the said fens as proprietors of the said houses and toftsteads. And shall also set out and allot the residue of the said common fens unto and amongst the said Sir Gilbert Heathcote, in respect of his said cottage and pastures, and the several other proprietors of field or meadow lands and ancient inclosures within the said parish, having right of common as aforesaid, in proportion to the several estates and properties which they have therein respectively," &c.

Section 9 enacts: "That the several lands and grounds to be assigned, set out, allotted, and appointed unto and for the several persons who shall be entitled to the same, shall be and are hereby vested in them respectively, in full bar of and satisfaction and compensation for his, her, or their several pieces and parcels of ground, which he, she, and they respectively held before the passing of this Act, or immediately before the said allotments were made, and which now are dispersed in the said fields and meadows intended to be enclosed; and also in full bar, satisfaction, and compensation of and

for all right of common and other right whatsoever in, over, and upon the same; and also in, over, and upon the said fields, meadows, and common fens; and that from and immediately after the making of the division and allotments and the execution of the said award, &c., all right of common belonging to or claimed by all and every the owners, proprietors, or occupiers of lands, tenements, or other hereditaments, and of all other persons whatsoever in, over, and upon the said lands and grounds intended to be enclosed as aforesaid and every part thereof, and also all tithes, both great and small, and all other payments whatsoever (mortuaries and surplus fees excepted, and which shall still remain payable and be paid in such and the same manner as they would have been in case this Act had not been made) shall cease, determine, and be for ever extinguished."

By section 10. "In case any of the proprietors of allotments to be made by virtue of this Act in the said common fens, in lieu of copyhold estates, shall desire to have such their allotments enfranchised, and shall signify such their desire in writing to the said commissioners at any of their meetings before the making of the allotments of the said fens, it shall and may be lawful for the said commissioners, &c., to allot a quantity of land equal to two-thirteenth parts of such allot-

that if the Act be susceptible of the interpretation which has been put upon it by long usage, the Courts will not disturb that construction: *Fermoy Peerage Case (a)*.] This Act recites that the soil and freehold of the fens was in the lords of the manor, and it appears that they were also entitled to certain eatage thereon (broulage). Other persons, proprietors of commonable cottages, &c., were entitled to the herbage. It may be presumed that some of the commonable cottages were freehold and some copyhold. By section 6, the commissioners are to allot twenty acres to the lords of the manors, in lieu of their broulage and right to the wastes and soil in the said fens, in certain proportions. Then, there is a saving of the rights of the lords in these words. "Nothing in this Act contained shall prejudice, lessen or defeat the right, title or interest of any lord or lords of any manor, and within the jurisdiction or limits whereof the said fields, meadows and common fens hereby directed to be inclosed on any part thereof are lying, and being of, in and to the seigniory or royalties incident to or belonging to such manors or lordships or reputed manors, but that such lord, &c., shall and may from time to time, and at all times hereafter, hold and enjoy all rents, services, courts, perquisites and profits of court, and all other royalties and privileges to the said manor or lordships, &c., belonging or appertaining other than those meant or intended to be barred or destroyed by this Act, &c." This saving relates only to the seigniorial rights of the lords. Whatever other right they had to the soil and broulage was extinguished: *Townley v. Gibson (b)*. [Bramwell, B.—The lords, as owners of the soil, had a right to every profit except that to which the commoners were entitled. All such rights, including right to mines, as in *Townley v. Gibson (b)*, may have been extinguished, and yet their rights

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as lords of the copyhold manor may not have been affected.] The term "soil" must be taken to include the whole interest of the landowner as distinguished from the profits to which the commoner is entitled, unless it is shewn that there are other expressions in the Act which limit its meaning: *Earl of Rosse v. Wainman* (*a*); *Micklethwait v. Winter* (*b*). Lord Kenyon, in *Townley v. Gibson* (*c*), says, "the defendant's counsel have supposed that mines are a distinct right from the right to the soil; but where the soil is in the lord all is resolvable into the ownership of the soil, and a grant of the soil will pass every thing under it." Here the lord's right to fines, as lord of the copyhold manor, was equally resolvable into the ownership of the soil. The lord has given up his rights, for which he has received satisfaction. Lord Kenyon points out that the tenants cannot take as copyholders unless the act of parliament has so directed, but they take their allotments as freehold estates of inheritance, and that it is clear that no new tenure can be created, unless by the authority of parliament, since the statute "Quia Emptores." All rights of the lord which depend on ownership of the soil are extinguished, and there is no authority for the exception of his right as lord of the copyhold manor, by implication. Where a new tenure is to be created it must be by express words. Such words are found in other sections of this Act, where the legislature intended to provide that lands should be of copyhold tenure; thus, by sect. 22, relating to exchanges, it is provided that lands allotted in lieu of any lands to be exchanged which, before such division or exchanges, were leasehold or copyhold, shall be deemed to be leasehold or copyhold though the same were before freehold. And in the clause relating to

- (*a*) 14 M. & W. 859. In error, *James Graham, Bart., v. Errol,*  
*2 Exch. 800.* *ante*, p. 550: per *Erie, J.*  
 (*b*) 6 Exch. 644. See also *Sir* (*c*) 2 T. R. 701.

cowpasture it is provided, that the cowpasture shall remain and be of the same tenure as the houses in respect of which it is allotted, but shall not be subject to any fee or fine whatever to the lords of the manors. Then immediately follows the provision that "the commissioners shall set out and allot in such part of the fens as they shall think proper, amongst the several proprietors, six and a half acres, which shall be in lieu of and in compensation for the right and property in the said fens as proprietors of the said commonable houses, &c., and shall also set out and allot the residue of the said common fens amongst the several proprietors of fields &c. having right of common, *in proportion to the several estates and properties which they have therein respectively.*" Nothing is said as to tenure: it would be clear, if the Act stopped there, that the allotments were to be of freehold tenure, and the reservation of seignories and royalties does not alter the case: *Doe d. Lowes v. Davidson* (a). [Alderson, B.—In that case the Act said nothing as to the tenure of the allotments. The question here is, whether the Act does point out of what tenure the allotments were to be? The 10th section expressly provides for the enfranchisement of allotments in lieu of copyhold interest. Therefore it appears that they were to be allotted as copyhold, if not enfranchised in pursuance of the power given by that clause. And that construction is in accordance with a practice which has prevailed for eighty-two years.] If the recitals in an Act be repugnant to the express enacting words the recitals must be rejected. That rule applies here. [Bramwell, B.—There is no enactment repugnant to the 10th section. The clause relied upon by the defendant is merely one from which it might be presumed that the allotments were to be freehold. Pollock, C. B.—It is clear, from a perusal of the

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whole Act, that it was intended that whatever was copyhold at the time of the passing of the Act, should continue to be held as copyhold, unless it was enfranchised in the mode provided by the Act.]

*Cur. adv. vult.*

*As to the Fines claimed on Nine Allotments in the South Fen or Cowpasture.*

In reference to the directions contained in the said Act of Parliament of 1766, to the commissioners to set out land for a cowpasture or cowpastures (a), the said award recites that the owners of commonable houses in the hamlets of Dyke and Cawthorpe did not signify their desire of having their cowpastures allotted to them in Dyke Fen, and the commissioners accordingly set out and allotted the whole of the South Fen, containing (exclusive of allotments to the impropriator and vicar respectively, and of two parcels of land to the Earl of Exeter) 887 a. 2 r. 4 p., to be used and enjoyed as a cowpasture by the owners of commonable houses and toftsteads in the towns of Bourn, Dyke and Cawthorpe, according to the directions of the said Act.

In the year 1772 (12 Geo. 3) another Act was passed for dividing, inclosing and draining the said cowpasture in the South Fen, and for amending and rendering more effectual the said first mentioned Act (b).

(a) See section 6, *ante*, p. 845, note.

(b) The material parts of this Act are as follows:—It recites: “Whereas in pursuance of an Act made in the sixth year of the reign of his present Majesty, intituled ‘An Act for allotting, dividing, inclosing, and draining several open and common fields, meadows, wastes, and fen grounds

within the manor and parish of Bourn,’ &c.; the said fields, meadows, wastes, and fen grounds have been divided and allotted, and a certain parcel of land containing 870 acres or thereabouts, lying in the South Fen within the said parish of Bourn, was by the commissioners acting by and in pursuance of the powers by the said Act given, allotted and assign-

The commissioners made their award, in pursuance of the last Act, on or about the 7th of July, 1777.

ed to the owners of commonable houses and toftsteads in the towns of Bourn, Dyke and Cawthorpe, to be used and enjoyed by them as a cowpasture: And whereas, by experience, it is found by the said owners of commonable houses and toftsteads, that the said parcel of land so allotted to be used and enjoyed as a cowpasture, will not answer the end intended by the said Act, &c., as being in its present tenure incapable of supporting the cattle depastured thereon; and also, by reason of its being frequently overflowed with water, very inconvenient to the owners of the said commonable houses and toftsteads: but if the same was divided and inclosed and properly drained, and the said Act, &c., in some respects amended, it would greatly benefit the estates of the said owners of commonable houses and toftsteads and other persons interested therein; but as the said good purpose cannot be effected without the aid and authority of parliament," and after appointing commissioners and directing that a survey shall be made, it enacts

"That the said commissioners, &c., shall and they are hereby empowered and required as soon as conveniently may be, &c., to divide, set out, and allot the said South Fen or cowpasture in the following manner (that is to say), in the first place they shall set out a parcel or parcels of land not exceeding four acres, for the purpose of getting stone and other

materials for the uses hereinafter mentioned; and in the next place shall set out the land appropriated by the said former Act for the repairs of the South Fen bank, and other uses hereinafter mentioned; and shall afterwards set out and allot the residue of the said South Fen or cowpasture (exclusive of the allotments before directed to be made, and of the private roads and ways to the several allotments) unto and amongst all and every the proprietors of commonable houses and toftsteads, situate and being in the towns of Bourn, Dyke and Cawthorpe aforesaid, pursuant and according to the numbers of such houses and toftsteads respectively, &c.; and that all the allotments which shall be made of the said South Fen or cowpasture, in pursuance of this Act, shall for ever thereafter remain and be of the same tenure with such houses and toftsteads respectively.

Provided always, and be it enacted, &c., that in case any of the proprietors of customary or copyhold estates within and held of the several manors of Bourn and Bourn Abbotts in the said parish of Bourn, shall be desirous of enfranchising the same or any part thereof, that then it shall and may be lawful to and for such proprietors to enfranchise his, her, or their said customary or copyhold estates, making such compensation in land to the lord or lords of the said several manors as shall be agreed upon

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No allotments whatever are made by this award to the lord of either of the manors in lieu of any of his rights as lord of such manor, but after deducting the allotments for getting stones and materials, and the allotments of land appropriated by the said first Act for the repairs of the South Fen Bank and other uses therein mentioned, the residue was allotted, according to the Act, to and amongst the parties entitled thereto, and each of the allotments of the said residue is specified in the award to be allotted either as freehold or as copyhold of the manor of Bourn, or as copyhold of the said manor of Bourn Abbotts.

The allotments so specified in the said award to be allotted as copyhold of the manor of Bourn Abbotts, are about sixty-eight in number, and contain, collectively, about 212 a. 2 r. 335 p., amongst which are the nine allotments to which this action specially relates, which were, in fact,

between such proprietors and the lords of the said manors under whom such copyhold estates are respectively held, so as all and every such agreements for enfranchising be made by and with the consent and approbation of the said commissioners, &c.; and that after such compensation in land shall have been made to the lord, &c., and the execution of the said award, the remaining part of such copyhold estates, for which such compensation shall be so made, shall for ever after be deemed freehold, and held and enjoyed as such.

Provided always, that nothing in this Act contained shall prejudice, lessen or defeat the right, title or interest of any lord of any manor, &c., within the jurisdiction or limits whereof the said South Fen or cowpasture, hereby directed to be inclosed, is

lying, and being of, in and to the seigniory or royalties incident to or belonging to such manors, &c.; but that such lord, &c., for the time being, and all and every other person or persons claiming under him, &c., as lord of the said manors, &c., shall and may from time to time and at all times hereafter hold and enjoy all rents, services, courts, perquisites and profits of courts, and all other royalties and privileges to the said manors, or to the lord thereof or any claiming under him or them, incident or appendant, belonging or appertaining (other than those meant or intended to be barred and destroyed by this Act), in as full, ample and beneficial manner, to all intents and purposes, as they ought or might have held or enjoyed the same before the passing of this Act, or in case the same had never been made."

allotted as copyhold of the said manor, tenements, parcel and holden of that manor.

From the making of the said second award, to the year 1824, the practice in respect to admissions to copyhold allotments, under the said second award, has been as follows:—

Where one and the same party was, at one and the same time and by one and the same admission, admitted to any of the allotments so described as copyhold in the South Fen, and to the tenement in respect of which it was allotted, one fine only was assessed and paid, and one quit rent only was paid to the lord; but where a party was admitted to any of the said allotments so described as copyhold in the said South Fen, without the tenement in respect of which it was allotted, then a fine was assessed and paid to the lord, on such admission, in the same way as fines were and are by the custom assessed and paid on the admission to any ancient copyhold tenement, parcel and holden of the same manor, and the quit rent was apportioned between such allotments and the tenement from which it thus became severed.

Instances of fines being so as aforesaid assessed and paid on admission to such allotment so described as copyhold, without the tenements in respect of which they were allotted, are very numerous, and extend over the whole period, from the making of the award in 1777, to and inclusive of the year 1823.

In 1824 the liability to pay a fine, on an admission of the last mentioned description, was disputed, and various instances, in and since that year, have occurred in which payment of such a fine has been refused. The lords of the manors have always, however, claimed and contended that fines were payable on such admissions, and have uniformly entered on the court roll of each admission the usual

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words importing that a fine was paid thereon, but leaving a blank for the amount of such fine when it has been refused; but this is the first time in which either of the lords has proceeded to attempt to enforce payment.

Previous to the 25th June, 1811, the said nine allotments in the South Fen became vested in James Digby, who was admitted tenant thereto respectively, and paid a fine and fees upon each admission.

The defendant was admitted to four of the said nine allotments, without the tenements in respect of which the same allotments were awarded. The defendant was admitted to the remaining five of the said nine allotments, with the tenements in respect of which they were awarded.

The plaintiff, as lord of the manor of Bourn Abbotts, at the time of the last mentioned admission, assessed a separate fine in respect of the admission of the defendant to each of the said four allotments. And as to each of the remaining five allotments, the plaintiff assessed one fine in respect of the admission of the defendant, both to the allotment and the tenement, in respect of which the allotment was made.

The fines assessed in respect of the said four allotments, supposing any fines to be assessable and payable, were duly assessed and demanded. And as to the remaining five allotments, if a fine was assessable and payable in respect of the value of each of the said five allotments, as well as in respect of the value of the tenements in respect of which they were awarded, then the five fines so assessed in respect of the said five allotments and tenements were duly assessed and demanded, but otherwise not.

The defendant has paid to the lord of the manor (without prejudice to any question in this case) a sufficient sum for a fine in respect of his admission to each of the said five last mentioned tenements and allotments, supposing the

value of the allotments ought not to have been so taken into consideration in assessing the fines as aforesaid.

The question for the opinion of the Court, as to the South Fen, is, whether the said fines are payable in respect of the admission of the defendant to all or any of the said nine allotments?

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Sir *F. Thesiger* (with whom *Lush*), for the plaintiff (a).—The question depends on whether the exemption of the cowpasture from fines continued after it was divided and allotted in pursuance of the 12 Geo. 3. The Act of 1766 provides for the allotting such parcel of land in the fens “to be used and enjoyed as a cowpasture or cowpastures by the owners of commonable houses and toftsteads, in the towns of Bourn, Dyke and Cawthorpe, as shall be equal to two cows for each commonable house, &c., to be used and enjoyed as a cowpasture only from May Day to Martinmas, yearly, and from Martinmas until Lady Day, the same may be depastured with sheep by the owners of such commonable houses, &c., and the same same shall, for ever thereafter, remain, go along and be of the same tenure with such houses and toftsteads respectively, but shall not, any of them, be subject or liable to any fee or fine whatsoever to the lords of the said manors.” The cowpasture having been allotted under this Act, in the 12 Geo. 3, an Act was passed for dividing, allotting and draining the cowpasture, by a clause in which it was provided that the commissioners shall set out and allot the cowpasture “unto and amongst all and every the proprietors of commonable houses, &c., in the towns of Bourn, &c., and that all the allotments which shall be made of the said South Fen or cowpasture in pursuance of this Act shall, for ever thereafter, remain

(a) Nov. 19. Before *Pollock*, C. B., *Alderson*, B., *Bramwell*, B., and *Watson*, B.

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and be of the same tenure with such houses and toftsteads respectively." The intention of the legislature was, that when the allotments were made they might be held as separate tenements, disjoined from the houses to which the right of pasture had previously appertained. There is no proviso exempting the new tenements so created from fines. But there is a saving of the right of the lord of the manor (*a*). The defendant contends that the exemption from fines, which existed when the owners of the houses had merely a common of pasture, continued when they acquired new tenements under the latter Act. But the exemption was an exemption of the property while in a particular state. When the cowpasture was appurtenant to the commonable houses there was not a larger fine in respect of the increased value of the house by reason of the right of pasturage, but a fine was payable upon every alienation. After the allotment under the Act of 1772 separate tenements became new estates, and the custom of the manor applied to the tenements so created. [*Bramwell*, B.—Under the Act of 1766, the value of the cowpasture would have been estimated in assessing a fine on the alienation of a commonable house, if the cowpasture had not by the Act been specially exempted from fines and fees. *Alderson*, B.—By the Act of 1766, the common of pasture was converted into a portion of common pasture, of which it could not be said that any one portion was either freehold or copyhold. You contend, that when it was subdivided, and each portion was converted into land of the same tenure as the houses, then such portion became a new copyhold tenement.] No part of the right to pasturage, which existed under the first Act, was a copyhold tenement. There is a power to enfranchise. [*Alderson*, B. That clause applies to the whole estates, and therefore

(*a*) *Ante*, p. 862, note.

have very little weight as to the allotments.] If there is any doubt, the usage since the passing of the Act is in favour of the plaintiff's construction, and the "contemporanea expositio," must prevail, unless the Act of 1766 created copyhold tenements perpetually exempt from fine.

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*Hugh Hill* (with whom *Braithwaite* and *G. R. Clarke*), for the defendant.—In *Lord Lonsdale v. Rigg* (a) there was a large stinted pasture enjoyed by the owners of eighty cattlegates, and it appeared that the right to turn on cattle was a customary tenement. The cattlegates passed by conveyance and admission, and upon admission a fine was payable. An Act had passed for empowering the lord to enfranchise any of the copyholds, under which some of the cattlegates had been enfranchised, and the owners of the two classes of estates held the pasture in common. Here, by the 6th section of the Act of 1766, the commissioners were to allot a parcel or parcels of land as a cowpasture or cowpastures. They might have allotted separate parcels, one to each owner of a commonable house. The allotment was copyhold or freehold, according to the tenure of the house to the owner of which it was allotted. The freeholders and copyholders had an exclusive right to the "vestura terræ." The lord had an undivided interest in the soil of the copyhold portion but no fines or fees were payable. The Act of 1772 does not repeal the provisions of the Act of 1766, the rule being that statutes relating to the same subject-matter must be read together, and that affirmative words in a later Act do not repeal the provisions of a former Act if they can stand together. The interest of each owner of the cowpasture allotted under the Act of 1766 was a tenement. [*Bramwell, B.*—Do you contend that under the Act of 1766, the right of pasture was separable from the houses in respect of which

(a) 11 Exch. 654.

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it was allotted? It is important to your case to shew that it was not a mere easement.] There might be a difficulty in supporting the proposition that it was separable, but the Act treats it as capable of tenure. [Alderson, B.—If the allotments were now conveyed without the houses, the tenants might still be liable to pay fees to the steward. The words "shall not be liable to any fee or fine whatever to the lords of the manors" relate only to fines payable to the lord; the words "fine" and "fee" are used as convertible terms.] The Act of 1772 states that the pasture shall be divided which was before held in common; and the only alteration is that instead of an undivided share, by the partition each got a separate piece of land which he could improve. Nothing is taken out of the lord of the manor either by the latter Act or the allotment in pursuance of it. As to the "contemporanea expositio," the right of the lord to fines was always contested.

Sir F. Thesiger, in reply.—The Acts are not in "pari materia." The original Act was for inclosing generally lands in Bourn. Under that Act the cowpasture was to be set out for the owners of commonable houses within the manor, and rights of pasturage over it were to be allotted to each owner of commonable houses, not as distinct copyhold tenements, but as appurtenant to the houses. The latter Act was for dividing and inclosing the cowpasture and allotting to each householder a distinct tenement. The Act of 1772 must therefore be construed as if it stood alone.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

Watson, B.—There are two questions raised for our judgment by this case. First, whether or not the five

tenements in the North Fen are copyhold of the manor of Bourn; and secondly, whether or not the plaintiff, as lord of the manor of Bourn, is entitled to the fines on the alienation of the nine tenements in the South Fen, mentioned in the special case. As to the first point we expressed our opinion, in the course of the argument, that these five tenements are by the operation of the Inclosure Act of 1766, and the award in pursuance thereof, created copyholds of this manor, and consequently that the plaintiff is entitled to the fines on alienation thereof, mentioned in the special case. It is true, as argued at the bar, that where lands, wastes of a manor, are allotted in pursuance of the provisions of an Inclosure Act, they do not become copyhold, unless by express enactment: *Doe d. Lowes v. Davidson* (a). But in this case we do find that by the provisions of the Act, by irresistible conclusion, the legislature intended that these tenements in the North Fen should become copyhold. Judgment will be given for the plaintiff on this part of the case.

The second question is with reference to the allotment of a cowpasture in the South Fen under the Acts of 1766 and 1772. The first Act, 1766, provided that the commissioners should allot a cowpasture in the South Fen to the owners of messuages, &c., and that the cowpasture so allotted should be of the same tenure as the messuages in respect of which it is allotted; and where it is allotted to a copyhold messuage, it shall be copyhold without any fine payable to the lord. The enactment is as follows:—The commissioners shall set out and allot such parcel or parcels of land in the said fens to be used and enjoyed as a cowpasture or cowpastures by the owners of commonable houses and toftsteads, in the towns of Bourn, Dyke and Cawthorpe, as shall be equal to two cows for each com-

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(a) 2 M. & Sel. 175.

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monable house and toftstead in the said town, so as the same do not exceed three acres, quantity and quality considered, to each such house and toftstead, to be used and enjoyed as a cowpasture only from May Day to Martinmas Day, yearly, and from Martinmas until Lady Day, yearly, the same may be depastured with sheep by the owners of such commonable houses and toftsteads, so as the same do not exceed three sheep to each such house or toftstead, and the same shall, for ever thereafter, remain, go along and be of the same tenure with such houses and toftsteads respectively, but shall not any of them be subject or liable to any fee or fine whatsoever to the lords of the said manors or either of them." The commissioners made their award, and set out a cowpasture in the South Fen in pursuance of that provision.

The Act of 1772 was passed for the purpose of dividing the cowpasture amongst the persons entitled thereto under that award so that each of the parties entitled should hold his share in severalty, which cowpasture, by an award made under the Act of 1772, was so divided and allotted. The provision in the Act of 1772 was as follows:—" And whereas by experience it is found by the said owners of commonable houses and toftsteads, that the said parcel of land so allotted to be used and enjoyed as a cowpasture will not answer the end intended by the said Act made in the sixth year of his present Majesty's reign, as being, in its present tenure, incapable of supporting the cattle depastured thereon; and also by reason of its being frequently overflowed with water, very inconvenient to the owners of the said commonable houses and toftsteads: but if the same was divided and enclosed, and properly drained, and the said Act of the sixth year of his present Majesty's reign in some respects amended, it would greatly benefit the estates of

the said owners of commonable houses and toftsteads, and other persons interested therein; but the said good purposes cannot be effected without the authority of parliament:" it is enacted, "that the commissioners shall set out a parcel or parcels of land, not exceeding four acres, for the purpose of getting stone and other materials for the uses herein-after mentioned, and, in the next place, shall set out the land appropriated by the said former Act for the repairs of the South Fen Bank and other uses hereinafter mentioned, and shall afterwards set out and allot the residue of the said South Fen or cowpasture unto and amongst all and every the proprietors of commonable houses and toftsteads, situate and being in the towns of Bourn, Dyke and Cawthorpe aforesaid, pursuant and according to the numbers of such houses and toftsteads respectively, as settled and allowed by the commissioners acting by virtue of the powers to them given by the said former Act, and ascertained and confirmed in and by their award made and executed in pursuance thereof, and that all the allotments which shall be made of the said South Fen or cowpasture, in pursuance of this Act, shall, for ever thereafter, remain and be of the same tenure with such houses and toftsteads respectively: Provided always, and be it enacted, by the authority aforesaid, that, in case any of the proprietors of customary or copyhold estates within and held of the several manors of Bourn with the members, and Bourn Abbotts with the members, in the said parish of Bourn, shall be desirous of enfranchising the same or any part thereof, that then it shall and may be lawful to and for such proprietors to enfranchise his, her or their said customary or copyhold estates, making such compensation in land to the lord or lords of the said several manors as shall be agreed upon between such proprietors and the lords of the said manors under whom such copyhold estates are respectively held,

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so as all and every such agreements for enfranchising be made by and with the consent and approbation of the said commissioners or any two of them, to be ascertained, specified and declared in the award or instrument herein-after mentioned, and that after such compensation in land shall have been made to the said lord or lords of the said manors respectively, and the execution of the said award, the remaining part of such copyhold estates, for which such compensation shall be so made, shall for ever after be deemed freehold, and held and enjoyed as such." The effect of this act of parliament and award was to allot in severalty these nine tenements now held by the defendant, and they continue to be copyhold; and as nothing is said about fines in the last Act, we are of opinion that the provision in the Act of 1766, that such parts of this cow-pasture as were copyhold should be held without payment of fine, exempts the owners of these nine tenements when divided and held in severalty under the Act of 1772, from liability to the lord's fine. Therefore, on this part of the case, our judgment will be for the defendant.

Verdict to stand for the plaintiff for the amount of fines in respect of the admission of the defendant to the five tenements in the North Fen, and as to the residue a verdict to be entered for the defendant.

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## CLEEVE v. HARWAR.

WILDE v. STANNER.

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**I**N these cases, writs of scire facias had issued at the suit of the plaintiffs against the defendants, as shareholders in a Joint Stock Banking Company, called "The Royal British Bank," on judgments recovered against the official manager of the bank. The declarations were in the usual form, setting out the writs. In the first case the defendant pleaded as follows:—

Plea.—That the writ in the declaration mentioned, and the declaration were and are proceedings taken by plaintiff against the defendant for the recourse of the plaintiff against the person, property, or effects of the defendant as an alleged member for the time being of the said Royal British Bank: that before the issuing of the writ, the Royal British Bank being a commercial or trading Company within the meaning and subject to the provisions of an act of parliament made and passed, &c. (7 & 8 Vict. c. 111), and being unable to meet its pecuniary engagements, had become and was duly and according to law adjudged bankrupt within the true intent and meaning of the said statute and the statutes in force concerning bankrupts, which adjudication still remains and is in full force and effect: that the debt in the said writ of scire facias mentioned, and to satisfy which, and the damages for the nonpayment thereof, the said proceedings in scire facias have been taken by the plaintiff against the defendant, was a debt due from the Royal British Bank to the plaintiff, before and at the time of the bankruptcy of the Royal British Bank and proveable under the same:

A judgment creditor of a Joint Stock Banking Company may proceed to execution against a shareholder by scire facias; the summary remedy given by the 13th section of the 7 & 8 Vict. c. 113, being cumulative.

The 7 & 8 Vict. c. 111, s. 10, does not render proof of the debt in bankruptcy a condition precedent to the right of the plaintiff to maintain the scire facias, but only prohibits the issuing of execution on the judgment in scire facias till after such proof.

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that although divers meetings have been held in the Court of Bankruptcy for the purpose of enabling the creditors of the Royal British Bank to prove their debt against the same, and the plaintiff might have proved his debt at the said meetings or one of them, the plaintiff did not at any time before the issuing of the said scire facias by him prove his said debt under the said bankruptcy, nor has the same been at any time proved in bankruptcy before the said scire facias was issued, as by the first mentioned statute in such case made and provided is required.

Demurser and joinder therein.

No counsel appearing on behalf of the plaintiff, the Court called on

*Beasley*, for the defendant (*a*).—The plaintiff was bound to prove his debt in the Court of Bankruptcy, before he sued out the writ of scire facias. By the 10th section of the Winding-up Act, 7 & 8 Vict. c. 111, no action by a creditor of a Company, so far as concerns his recourse against any member thereof, shall affect his right to sue out a fiat against the Company: “Provided that no execution in respect of any debt or demand proveable under the fiat against any such Company or body adjudged bankrupt shall be issued against the person, property, or effects of any member or members for the time being of such Company or body, or any former member or members thereof, until after such debt or demand shall have been proved under such fiat.” That provision would be an answer to a rule for execution, and it affords a substantial defence to this action. Scire facias is deemed a judicial writ, or writ of execution: Bac. Abridg. tit. “Scire facias” (A.). By the statute, the execution is to issue upon certain conditions; that is, certain matters being the foundation for it, it is

(*a*) Feb. 11. Before *Pollock*, C. B., *Bramwell*, B., and *Watson*, B.

manifest that the Court must have the power to investigate the truth of those matters advanced as the foundation of the scire facias: per *Pollock*, C. B., in *Devereux v. Kilkenny Railway Company* (*a*). Mere matters of practice cannot be pleaded, but it is otherwise with matters required to be done by the common or statute law, and which must be noticed by a Court of error: *Sandon v. Proctor* (*b*).

*Cur. adv. vult.*

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**I**N this case the defendant demurred to the declaration on the ground that the plaintiff could not proceed by scire facias. The defendant also pleaded a plea which was demurred to, and which raised a similar question to that in the above case.

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*Rowley*, for the defendant.—The plaintiff cannot proceed by scire facias, but must pursue the remedy given by the Joint Stock Banking Act, 7 & 8 Vict. c. 113. The 10th section of that Act enables a plaintiff to issue execution against any shareholder, if he cannot obtain satisfaction by execution against the property and effects of the Company. The 13th section provides that execution against any shareholder may be issued by leave of the Court, or a Judge, “upon motion or summons consistent with the practice of the Court, without any suggestion or scire facias in that behalf.” The 7th section provides that, notwithstanding the incorporation of the Company, the shareholders shall be liable, “subject to the provisions hereinafter contained.” By section 9 every judgment against the Company may be executed against the property and effects of the Company, “and also, subject to the provisions hereinafter contained, upon the person, property and effects of every shareholder.”

(*a*) 5 Exch. 834.

(*b*) 7 B. & C. 800.

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Therefore the liability is created and the remedy provided by the statute. The language of the 13th section of the 7 & 8 Vict. c. 113, is different from that of the 68th section of the Joint Stock Companies Act, 7 & 8 Vict. c. 110. [Bramwell, B.—The question is, whether the remedy is not cumulative.] Wherever a statute creates a liability and prescribes a particular remedy for its enforcement, that remedy must be pursued: *Underhill v. Ellicombe* (*a*), *The Dundalk Western Railway Company v. Tapster* (*b*), *Stevens v. Jeacocke* (*c*), *Couch v. Steel* (*d*). The defendant is prejudiced by this mode of proceeding, inasmuch as he cannot plead to the scire facias any matter which would have been available as a defence to the original action: *Peddell v. Guyra* (*e*), and the question of liability may be determined on affidavit more speedily and with less costs than by a jury.—He also argued that the plaintiff was bound to prove his debt in the Court of Bankruptcy before he issued the scire facias.

No counsel appeared for the plaintiff.

*Cur. adv. vult.*

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The judgment of the Court in the above cases was now delivered by

BRAMWELL, B.—These were cases in which writs of scire facias had been issued against shareholders on judgments recovered against a banking Company, established under the provisions of the 7 & 8 Vict. c. 113; and the same question, though made only in one case, arose in each, viz., whether the plaintiff had a right to proceed by scire facias or was limited to the remedy given by the 13th section of the statute. In support of the latter view, in addition to several reasons of alleged inconvenience, it was contended that the general rule applied, viz., that where a right is given by

(*a*) M'Clel. & Y. 450.

(*d*) 3 E. & B. 402.

(*b*) 1 Q. B. 667.

(*e*) *Ante*, p. 590.

(*c*) 11 Q. B. 731.

statute and a remedy, the remedy is exclusive, and *Underhill v. Ellicombe* (a), *Dundalk Western Railway Company v. Tapster* (b), *Stevens v. Jeacocke* (c), were cited, to which may be added *Marshall v. Nicholls* (d) and other cases. But in *Marson v. Lund* (e), it was held that a scire facias might issue under the provisions of the 7 & 8 Vict. c. 110, though the creditor had by that statute a right to execution similar to that given by the statute in question. An attempt was made to distinguish between the two statutes, and no doubt the words are not identical; but it is impossible to suppose that the legislature, in the same session, meant differently in two statutes having similar objects and nearly the same words in each. We hold ourselves bound therefore by the case of *Marson v. Lund*, and consequently decide this point in favour of the plaintiff.

The other question was, whether proof under the bankruptcy of the bank was a condition precedent to the right of the plaintiff to maintain the scire facias. That depends on the 7 & 8 Vict. c. 111, s. 10, which enacts that no execution in respect of any debt provable shall be issued against a member, or former member, of the Company till after the debt shall have been proved. We are of opinion however that this only prohibits the issuing of the writ of execution and not the obtaining of judgment on the scire facias. To hold otherwise would be attended with many inconveniences, such, for instance as that a writ of scire facias properly issued would be liable to be defeated by a supervening bankruptcy, or a plea like the present made bad by subsequent proof. If indeed the writ of execution should be issued without proof, it would be wrong. Our judgment therefore, on both points, is for the plaintiff in each case.

Judgment for the plaintiff in each case.

(a) McClel. & Y. 450.

(d) 18 Q. B. 882.

(b) 1 Q. B. 667.

(e) 16 Q. B. 344.

(c) 11 Q. B. 731.

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TURNER and Another, Assignees of R. GRIFFITH a  
Bankrupt, v. THOMAS JONES.

Feb. 9, 11.

A. sold goods to B., to be paid for by bills of exchange at certain future periods. Before the bills were due C. recovered a judgment against A., and obtained a Judge's order under the 61st section of the Common Law Procedure Act, 1854, for attachment of the debt due from B. to A., and to shew cause why B. should not pay C. the debt due from B. to A. Upon this order being served on B., he gave C. a promissory note payable by instalments for the amount of the debt due to A. No further proceedings were taken under the attachment. A. afterwards became bankrupt.— Held, that the debt due from B. to A. was not discharged by the promissory note given by B. to C., and consequently that A.'s assignees were entitled to recover it from B.

Sensible, that payment by the garnishee to the judgment creditor upon notice of the attachment, is no discharge of the debt due from the garnishee to the judgment debtor, but there must be a Judge's order for payment.

BY consent of the parties and order of a Judge, the following case was stated for the opinion of this Court:—

On the 3rd of April, 1856, Richard Griffith sold certain goods and chattels to Thomas Jones for the sum of 454*l.*; the terms of payment, according to the contract of sale, which was in writing, being as follows:—"100*l.* in cash upon delivery of the goods, 100*l.* by a bill payable end of June then next, 50*l.* by a bill payable end of July then next, 100*l.* by a bill payable end of September then next, the balance by a bill payable end of December then next." The goods were delivered, and the 100*l.* to be paid in cash was paid, but no bills have ever been given.

Before and on the 2nd May, 1856, Richard Griffith was indebted to Richard Jones in 500*l.*, and was sued by him for the same in the Court of Exchequer, and on the 24th May, 1856, judgment was obtained in the action.

On the 28th May, 1856, Richard Jones, pursuant to the 61st section of the Common Law Procedure Act, 1854, obtained an order of a Judge at Chambers in the following terms:—

RICHARD JONES, Judgment Creditor,	against
RICHARD GRIFFITH, Judgment Debtor,	
THOMAS JONES, Garnishee.	

"Upon hearing the attorney for the judgment creditor, and upon reading the affidavits, &c., I do order that all debts owing or accruing from the garnishee to the said judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the said judgment creditor, in the Court of Exchequer of Pleas, on the 24th day of May, 1856, for the sum of 501*l.* 8*s.* 7*d.*, and upon which judgment the said sum of 501*l.* 8*s.* 7*d.* still remains due and unpaid. And I further

order that the said garnishee, his attorney or agent attend me at my Chambers, in Rolls Gardens, Chancery Lane, on Tuesday, the third day of June, at 3 o'clock in the afternoon, to shew cause why he should not pay the said judgment creditor the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

G. W. BRAMWELL."

This order was duly served upon Thomas Jones on the 30th May, 1856, and on the same day Thomas Jones, without the knowledge or consent of Richard Griffith, signed a promissory note for 354*l.*, by the terms of which he promised to pay to the said Richard Jones, or bearer, 100*l.* on the 3rd July then next, 50*l.* on the 2nd August then next, 100*l.* on the 3rd October then next, and 104*l.* on the 31st December then next.

On the 2nd July, 1856, Thomas Jones, with the full knowledge of the act of bankruptcy hereinafter mentioned, forwarded by post to the National Provincial Bank, Pwllheli, to the credit of Richard Jones, who received the same on the 3rd of July, 1856, he then having full knowledge of the act of bankruptcy hereinafter mentioned, 100*l.* in payment of the first instalment of the said promissory note.

On the 2nd June, 1856, Richard Griffith committed an act of bankruptcy, and on the 3rd June, 1856, was duly adjudicated a bankrupt. Written notice of this act of bankruptcy was served upon Richard Jones's attorney on the 2nd June, 1856, and on Thomas Jones on the 3rd June, 1856. No further proceedings than those above mentioned were taken under the attachment above mentioned. The plaintiffs were duly appointed assignees of Richard Griffith under the bankruptcy, and commenced this action on the 6th September, 1856, against the defendant to recover the sum of 150*l.*, being the amount alleged to be due and unpaid by him at the commencement of the suit to the bankrupt or his assignees,

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according to the contract of sale above mentioned between the defendant and the bankrupt.

The question for the opinion of the Court is, whether the plaintiffs as assignees of Richard Griffith are, under the circumstances, entitled to recover from Thomas Jones the said sums of 100*l.* and 50*l.* or either of them. If the Court shall be of opinion that the plaintiffs are entitled to recover both the said sums, then judgment to be entered for the plaintiffs for 354*l.* If the Court shall be of opinion that the plaintiffs are entitled to recover the said sum of 50*l.*, but not the said sum of 100*l.*, then judgment to be entered for the plaintiffs for 254*l.* If the Court shall be of opinion that the plaintiffs are not entitled to recover either of the said sums, then judgment to be entered for the defendant.

Brett, for the plaintiff.—First, the giving a promissory note is not payment within the garnishment clauses of the 17 & 18 Vict. c. 125: secondly, at the time the note was given, there was no debt due from the garnishee to the judgment debtor: thirdly, payment upon the mere service of a garnishment order is no discharge. The 60th section enables a judgment creditor to obtain an order for the examination of the judgment debtor as to debts owing to him. By section 61, a Judge may, upon the ex parte application of such judgment creditor, order that all debts, owing or accruing from any other person to the judgment debtor, shall be attached to answer the judgment debt. By section 62, service of the order on the garnishee shall bind such debts in his hands. By section 63, if the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, and does not dispute the debt, then the Judge may order execution to issue. By section 65, “payment made by or execution levied upon the

garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed." That means a payment in money of a debt due, and upon the order of a Judge. [Martin, B.—A Judge might make an order that the garnishee should pay an accruing debt when due.] *Holmes v. Tutton* (a) is an express authority that the service of the Judge's order only binds the debt in the hands of the garnishee, so that he cannot pay it to the judgment debtor, or any person claiming under him; and that the rights of the assignees under a subsequent bankruptcy are not affected by it. In *Hovill v. Browning* (b), a creditor of a trader attached his money in the hands of a third person, and recovered judgment, in the Mayor's Court of London, against the garnishee, who thereupon paid him the amount of the debt so attached. A commission in bankruptcy afterwards issued against the trader, and it was held that this payment was not protected by the 19 Geo. 2, c. 32, since it was not a payment made by the bankrupt in the usual and ordinary course of trade and dealing. Money obtained of a garnishee under a foreign attachment, is not, unless execution be executed, a compulsory payment, so as to be in effect a discharge of the debt due from the garnishee to the judgment debtor: *Wetter v. Rucker* (c).

Vaughan Williams, for the defendant.—First, there was a debt upon which the attachment could operate. It was a debitum in praesenti solvendum in futuro. The former part of the 61st section uses the words "all debts owing or accruing" from the garnishee; but the word "accruing" is omitted in the latter part of the section. If the debt is not

(a) 5 E. & B. 65.

(b) 7 East, 154.

(c) 1 B. & B. 491.

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due, the garnishee may appear before the Judge and shew that fact as cause against an order for immediate payment; or, if he thinks fit, he may pay the debt. By the 65th section, payment by the garnishee, under any such proceeding as aforesaid, shall be a valid discharge." The giving of the promissory note amounted to payment. The right to sue for the debt was suspended until after the note was due and dishonoured. [Bramwell, B.—*Holmes v. Tutton* (*a*) decided that the service of the garnishment order binds the debt so as to render the judgment creditor a creditor having security for his debt within the 184th section of the Bankrupt Law Consolidation Act, 1849, but does not give him a lien, so as to bring him within the exception in that statute, and consequently that the judgment creditor cannot prevail against the assignees.] [In that case there was merely service of the order, here there is the additional circumstance of the giving of the promissory note.

POLLOCK, C. B.—There must be judgment for the plaintiffs. *Holmes v. Tutton* governs the present case. That was a decision, after consideration, by a court of co-ordinate jurisdiction, and therefore binding on us.

BRAMWELL, B.—This case was partly argued on a former day, when my brother Martin was present, and I have his authority for stating that he agrees with me in opinion that the plaintiffs are entitled to recover. *Holmes v. Tutton* (*a*) is an authority, that an adjudication of bankruptcy, founded upon an act of bankruptcy subsequent to the service of the order for attachment, operates to prevent the debt from vesting in the execution creditor. The question then is, whether there is any thing in the circumstances of this case to distinguish it from that.

(*a*) 5 E. & B. 65.

Those circumstances are, that the garnishee was indebted to the judgment debtor in a sum of money, for which he agreed to give bills of exchange payable at certain future periods. Therefore the debt was not actually due, but accruing due; and it may be that such a debt is not attachable, but on that point I give no opinion. There were these further facts:—upon the service of the order on the garnishee, he gave to the execution creditor a promissory note, payable by instalments, for the amount in which he was indebted to the judgment debtor; and then the bankruptcy of the latter supervened. Under these circumstances, it appears to me clear that the debt of the garnishee is not discharged. A garnishee is not protected unless he is served with the order of a Judge for payment of the debt. He cannot volunteer to do that which his obligation to the judgment debtor did not compel him to do. Perhaps if a Judge erroneously ordered him to pay money which he actually owed, but which was not then due, he might be protected; but it is manifest that he cannot discharge himself by agreeing with the execution creditor to fulfil an obligation different from that which he was under to the judgment debtor. That is obvious from the 65th section, which declares that the amount paid or levied shall be a valid discharge to the garnishee, as against the judgment debtor, even though the proceeding be set aside or the judgment reversed. How can this be said to be a payment under the proceeding, when the proceeding did not compel him to make it? It is merely an arrangement which he chose to make with the execution creditor. Suppose the judgment debtor chose to pay the debt due from him to the execution creditor, and then to proceed to judgment and execution against the garnishee for the debt due from him, could the latter say that the debt was paid by his arrangement with the execution creditor. Other instances might be put, but without multiplying instances,

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it seems to me that the case may be decided on this short ground, that in order to discharge the garnishee, he must shew that he has done that which his obligation to the judgment debtor required, and further that the order of the Court compelled him to do it.

WATSON, B.—I entirely concur with the judgment of my brother *Bramwell*, and will only make one observation, viz., that I entertain a strong opinion that in order to discharge the debt it is not only necessary that the money should be paid by the garnishee to the execution creditor, but that an order should be made requiring him to pay it. I do not however wish to bind myself to that, but it is my present opinion.

Judgment for the plaintiffs.

THE GUARDIANS OF THE POOR OF THE LICHFIELD UNION  
*v.* WILLIAM GREENE.

Feb. 21.

The defendant executed a bond conditioned to be void, if G. should honestly, diligently and faithfully perform and discharge the duties of his office as treasurer of a poor-law Union.

**T**HIS was a special case (without pleadings) stated for the opinion of the Court under the provisions of the Common Law Procedure Act, 1852.

In 1851, Richard Greene was appointed treasurer of the Lichfield Union, and thereupon he, and the defendant, and one Lawton as his sureties, entered into a bond to

the guardians of a poor-law Union. One of the duties was to pay out of any money for the time being in his hands, belonging to the guardians, all orders, &c., drawn upon him. G. was a country banker issuing his own notes. On the 28th of December, the plaintiffs, the guardians of the Union, drew several orders for money, some of which having been presented at G.'s bank, and 96*l.* were paid in notes of the bank on that day. On the 31st of December the officer of the Union presented other orders, and received 200*l.* in notes of G.'s bank. On the same day the plaintiffs having to transmit money to London, their clerk presented to G. an order for 4*l.* 19*s.* 8*d.*, and obtained from him a common bankers' draft on a banker in London, which was afterwards dishonoured. G. stopped payment at 3 o'clock on the 31st of December, and on the 1st January was declared bankrupt. At the time of the presentation of the order G. had in his hands sufficient money of the guardians to pay them.—*Held*, that the defendant was not liable to make good either of the three several sums of money to the plaintiffs

the plaintiffs. The condition of the bond recited the appointment of Richard Greene in the manner prescribed by the rules and regulations of the Poor Law Board, and amongst other things, not material to the present question, contained a stipulation that Richard Greene *should honestly, diligently and faithfully perform and discharge the duties of his office.* One of the duties prescribed by the general consolidated orders of the Poor Law Commissioners was, "to pay out of any money, for the time being in his hands, belonging to the guardians, all orders for money which should be drawn upon him in conformity with article 84, when the same should be presented for payment at the house or usual place of business of the treasurer."

Richard Greene was a banker at Lichfield, and carried on business under the name of Palmer & Greene. On Friday the 28th of December, 1855, the plaintiffs drew several orders for money in the proper form, and delivered them to their clerk for the purposes of the Union. Some of them were presented for payment at the bank on that day, and paid partly in cash and the residue in 5*l.* bank notes of the bank (a). The notes were ordinary country bank notes, dated Lichfield, payable to bearer, on demand, at Lichfield, or at Messrs. Smith, Payne & Smith's, London. The bank stopped payment at 3 o'clock P. M. of Monday the 31st of December, at which time there were in the hands of the plaintiffs 95*l.* of these bank notes. On the 31st of December, about 11 o'clock A. M., an officer of the Union presented other orders at the bank, and was paid partly in cash and the residue in 200*l.* of similar bank notes. These notes were either never parted with or were returned to the plaintiffs, after the stoppage, by the persons to whom they were paid. As to the remaining claim of

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(a) The exact description of case, but the Court thought it the bank notes was given in the immaterial.

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4*l.* 19*s.* 8*d.*, an order, in the same form as the others, had been drawn by the plaintiffs in favour of some persons in London, and, on the 31st of December, the clerk of the plaintiffs took it to the bank, and received in exchange a common banker's draft, to the same amount, upon Messrs. Smith, Payne & Smiths, payable on demand; this was presented after the stoppage, and dishonoured and returned to the plaintiff. Richard Greene was declared bankrupt on the 1st of January. At the time of the presentment of the above orders, he had in his hands sufficient money of the plaintiffs to pay them. The plaintiffs have called upon the defendant to pay the sum of 299*l.* 19*s.* 8*d.*, alleging that he was liable to do so by notice of the bond. The defendant denied his liability to do so.

The question for the opinion of the Court is, whether the defendant is liable to pay to the plaintiffs any, and what portion, of the said sum of 299*l.* 19*s.* 8*d.*?

*Phipson* argued for the plaintiffs (*a*).—The real question here is, did R. Greene pay the monies in his hands? He did nothing more than promise to pay them. The notes having been dishonoured, there was no payment. If they had been taken and not presented within a reasonable time that might have amounted to payment. [*Bramwell*, B.—If a debtor gives his creditor a bank note in payment of his debt, in effect, he asks the creditor to present it. If a banker gives his own note he, in effect, asks the taker to keep and not to present it.] The argument on the other side must go to this extent, that if the notes were kept five minutes the sureties were discharged. [*Watson*, B.—All through the country, bank notes are used as currency. Here the question is, whether, as a matter of fact, the notes were not taken as a species of payment. *Bramwell*, B.—

(*a*) Feb. 12. Before *Martin*, B., *Bramwell*, B., and *Watson*, B.

The taking of these notes imposed no duty as between R. Greene and the plaintiffs to present them within any particular time.] It is true, that as between boards of guardians and the sureties on these bonds there may be payment by a transaction, which is not payment in the ordinary sense, as by the delivery of corn in *Pattison v. Guardians of the Belford Union* (a); but it must be something which is payment as between the treasurer and the guardians.

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*Malcolm*, for the defendant.—R. Greene failed to pay his own notes, but that is not a breach of the condition of this bond. Those who presented the orders received what they took as payment. Country bank notes are currency; *Vernon v. Boverie* (b). Greene faithfully performed the duties of his office when he paid the orders in such currency as the persons presenting them were willing to take. It cannot be seriously argued that the notes were taken as securities for money. As to the 4*l.* 19*s.* 8*d.* the guardians chose to accept the bill instead of money, for their own convenience; it is the same as if they had received the money and immediately handed it back and taken the bill.

*Phipson*, in reply.—The taking of the bill did not amount to a giving of time, nor did it otherwise discharge the principal, the obligation being by bond: *Worthington v. Wigley* (c). [*Bramwell*, B.—You may be in this dilemma. It is either payment or the giving of time which might entitle the sureties to an equitable plea. Then the doubt occurs to my mind whether, this being a special case without pleadings, the surety can rely on an equitable defence.

(a) *Anst*, p. 523.

(b) 2 *Show.* 296.

(c) 3 *Bing.* N. C. 454.

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Such a defence cannot be set up in ejectment (*a*). The 83rd section of the Common Law Procedure Act, 1854, enables the defendant "in any cause in any of the Superior Courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts, which entitle him to such relief by way of defence, and the said Courts are thereby empowered to receive such defence by way of plea, provided, &c." The statute does not say that these matters shall be defences at law. In that respect it deviates from the recommendation of the commissioners.]

*Cur. adv. vult.*

The judgment of the Court was now delivered by

BRAMWELL, B.—(After stating the facts as above set forth)—Upon behalf of the plaintiffs, it was argued that it was the duty of Richard Greene to pay the orders, and that the delivery by him of his own promissory notes, which were afterwards not paid, was no payment, and the case was likened to the payment of a debt by a bill of exchange or promissory note afterwards dishonoured, under which circumstances it was stated to be clear and admitted law, that the creditor could sue for the original debt. On the other hand it was argued on behalf of the defendant, that this was not a payment by a bill of exchange or promissory note as ordinarily understood, but a payment by bank notes which were treated as money or cash, both by the party paying and the party receiving; that the clerk or officer of the plaintiff might, if he thought fit, have insisted upon being paid in gold or in notes of the Bank of England,

(*d*) See *Neave v. Avery*, 16 C. B. 328.

and that he, having elected to be paid in the manner in which he was, could not, after the stoppage of the bank, repudiate it, and insist that it was not payment as against the defendant, a surety. It seems to be clear that a bank note is not to be considered, in all respects at least, as a bill of exchange or promissory note, payable at a distant date. In *Miller v. Race* (*a*), Lord *Manfield* says: bank notes "are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are or any other current coin that is used in common payments as money or cash." \* \* \* They are "never considered as securities for money but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes." Bank notes are also treated of and dealt with in a variety of acts of parliament (the Bank Acts and others), and restrictions put upon their issue and form. In England, practically, they cannot be issued for a less sum than 5*l.* (*b*); but it is notorious, that in Scotland and Ireland, local or country, 1*l.* bank notes form the great bulk of the ordinary currency of the country, and are in universal use. Bank of England notes are now a legal tender for all sums above 5*l.*, except at the Bank of England and its branches, and country bank notes are also a legal tender, unless objected to at the time on that account. (See *Byles on Bills*, p. 7, where the authorities are cited). It seems therefore clear that bank notes are in many respects different from bills of exchange and promissory notes ordinarily so called. The question as to the effect of payment by bank notes when the bank either has stopped at the time of the payment or

(*a*) 1 Burr. 452.

(*b*) See 17 Geo. 3, c. 30; 7 Geo. 4, c. 6.

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shortly after, has been frequently the subject of legal discussion ; and the case of *Camidge v. Allenby* (a) seems to contain the existing law upon the subject. In that case a distinction was taken between a payment by bank notes at the time of the sale or of the original transaction, and a payment by bank notes of a pre-existing debt. *Bayley*, J., whose opinion upon the subject is not expressed to be to the same extent as those of *Holroyd*, J., or *Littledale*, J., says : " If the notes had been given to the plaintiff at the time when the corn was sold he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. If, indeed, he could shew fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards." But *Holroyd*, J., and *Littledale*, J., both seem to be of opinion that if country bank notes are paid and received as money in any transaction of payment and both parties be innocent, that it is payment; the latter learned Judge expressly says, that in his opinion, " there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed." It has been already stated what, in the opinion of *Bayley*, J., is the effect of payment by bank notes at the time of the transaction or sale. But in the same case it is said, by the same learned Judge, that if a man takes bank notes " in payment of a pre-existing debt and the bank stops the following day, he is entitled at once to return the notes and treat them as nonpayment. So, also, if he circulated them on or before the following day, and they are returned to him by a person entitled to return them, by reason of the stoppage of the

(a) 6 B. & C. 373.

bank, his right to return them to his debtor still continues. (See also Byles on Bills, p. 154.) No case has arisen like the present where the person paying was the maker of the bank note himself, but as to the transaction on Friday the 28th, the case of the payer not being the maker seems to afford an analogy. If Mr. Richard Greene had paid the orders by bank notes of another bank in Lichfield which had stopped on Monday the 31st, the payment by him would have been good. According to the case of *Camidge v. Allenby*, the circumstance of these notes not having been presented for payment or circulated by the plaintiffs on the Saturday would have made it a good payment by Richard Greene and the loss would have fallen on the plaintiffs; and we think in analogy to this that the plaintiffs having kept in their possession during the Saturday the 95*l*, they thereby conclusively elected to treat the orders as paid, and that the sureties have a right to treat the transaction as payment.

The payment on Monday is obviously not within this principle, for the bank stopped payment about 3 o'clock of that day. But both payments, viz., that on the Friday and on the Monday seem to be within the principle laid down by *Bayley*, J., in respect of payment made by bank notes at the time of the sale or transaction, unless the circumstance that the person paying was also the maker of the notes, causes a difference. The liability to pay created by the bond and condition was to do so upon the orders being presented for payment. Immediately upon being presented they were paid, and therefore, according to the above principle, the bank notes were taken at the peril of the plaintiff, and we think the circumstance of Mr. Richard Greene being the maker is immaterial, for the plaintiffs have the right to prove against his estate to the amount

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of the notes, the same as the amount paid; and we are of opinion that the obligation of the defendant being that Richard Greene should, upon the presentment of the orders, pay them, when the plaintiffs, who were entitled to insist upon receiving sovereigns or Bank of England notes, thought fit to receive the bank notes, that the obligation of the defendant was thereby satisfied and discharged.

As to the 4*l.* 19*s.* 8*d.*, the plaintiffs' clerk having it in his power to demand cash, received for the plaintiffs' convenience a draft upon London in order to make the payment there. We think this discharged the sureties upon the principle of the cases of *Vernon v. Boerrie* (*a*) and *Strong v. Hart* (*b*).

We are therefore of opinion that the defendant is not liable to pay the whole or any portion of the sums in question, and that the plaintiff's remedy is confined to a proof upon the notes and bill against the estate of Richard Greene the bankrupt.

Judgment for the defendant.

(*a*) 2 Show. 296.

(*b*) 6 B. & C. 160.



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Feb. 7.

THE declaration stated, that on the 28th day of February, A.D. 1856, it was mutually agreed between the plaintiff, who was then the owner of the ship or vessel called the "Zwaan," belonging to Amsterdam, of the burthen of 494 D. tons, or thereabouts, and then lying in Amsterdam, and to sail from Amsterdam aforesaid for Liverpool on or before the 15th day of March then next, of the one part, and the defendants of the other part: that the said ship being tight, staunch and strong, and in every way fitted for the voyage should with all convenient speed be made ready and receive and take on board a full and complete cargo, or as much lawful goods and merchandise, including specie and machinery, as the defendants or their agents should tender alongside for shipment, not exceeding what she could reasonably stow and carry over and above her cabin

The defendant, a merchant at Liverpool, and the plaintiff entered into a charter-party in the following terms:—
"It is mutually agreed between the plaintiff the owner of the good ship (Zwaan) now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, of the one part, and the defendant, the charterer, of the other part: that the said ship being tight, staunch and strong,

shall with all convenient speed be made ready," &c., as in the usual printed form of charter-party. The exception was as follows:—"Restrictions of prouces and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, *throughout this charter-party always excepted.*" After the signing of the charter the broker, who had acted for the plaintiff, wrote in the margin, to come after the words "March next," "wind and weather permitting with cargo or in ballast for ship's benefit." He then took the charter to the defendant and told him that he had made the note in the margin which he said did not affect it. The defendant said that the note altered the matter and he did not know that he would then accept the charter, and he ultimately refused to do so. The ship did not sail from Amsterdam in consequence of what was admitted to be "the act of God."—*Held:* First, that notwithstanding the words "throughout this charter-party," the sailing of the ship from Amsterdam on the 15th March was a condition precedent to the obligation of the defendant to take and load the ship. Secondly, that the charter-party was avoided by the alteration so made in the margin.

To a declaration on the above charter-party alleging, as a breach, that the defendant made default in loading the agreed cargo and wholly refused to load the ship or otherwise perform the contract, and wholly repudiated the said charter-party, the defendants pleaded setting out the charter-party, by which it appeared that it was warranted that the vessel should sail from Amsterdam to Liverpool on the 15th of March, and alleged that the vessel did not sail from Amsterdam on or before the 15th of March. The plaintiff replied to this plea that before the time of the sailing of the ship from Amsterdam, the defendant refused and declined to load the ship or otherwise perform the charter-party.

Held, on demurrer, that the replication was bad.

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tackle, apparel, provisions, &c.; and being so loaded and dispatched the said vessel should with all possible speed sail and proceed to Batavia and Sourabaya, or either of them, or so near thereunto as she might safely get, and there deliver the said cargo in the usual and customary manner agreeably to bills of lading; restraints of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, throughout the said charter-party always excepted; on being paid freight 2*l* per Dutch registered ton, &c. (Then followed other stipulations not material to the present case.) And although the plaintiff did all things necessary on his part, and everything happened and was performed that ought to have happened and been performed, in order to entitle the plaintiff to the performance by the defendants of the charter-party, and to have the agreed cargo loaded on board the said ship: Yet the defendants made default in loading the agreed cargo, and wholly refused to load the said ship, or otherwise perform their said contract, and wholly repudiated the said charter-party: whereby the plaintiff has lost and been deprived of large gains and profits, &c.

Pleas.—First: that it was not agreed as alleged.

Secondly.—That the supposed agreement in the declaration mentioned was an agreement partly in print and partly in writing, and that in making and entering into the same, the plaintiff and the defendants made use of a printed form of charter-party and adapted such form to their agreement, by making such alterations therein and additions thereto as were necessary in that behalf: that the agreement so made and entered into was in the words and figures following.—(The plea then set out the charter-party verbatim: See *post*, p. 897).—Averments: that in the agreement, as above

set forth, the printed form of charter-party so used by the plaintiff and the defendants is denoted and shewn by black ink, and the alterations and additions so made in and to such form as aforesaid, are denoted and shewn by red ink. And the defendants further say that the said ship or vessel did not sail from Amsterdam for Liverpool on or before the 15th day of March in the said agreement mentioned, as in that behalf provided in and by the said agreement.

Thirdly.—That at the time of the making of the said agreement the said ship or vessel was lying at Amsterdam, without there being any contract or engagement that the said ship or vessel should, before receiving or taking on board the cargo in the said agreement mentioned, carry or be employed in carrying any cargo for the ship's benefit, or for the benefit of the plaintiff as owner thereof, or otherwise howsoever, of all which premises the plaintiff and defendants at the time of the making of the said agreement had notice: that the said agreement was made and entered into as in the second plea is above mentioned and was and is in the words and figures in that plea mentioned: and that after the same was so made and entered into, and whilst it was in the possession of and held by the plaintiff or his agents in that behalf, it was without the knowledge or consent of the defendants altered in material particulars (that is to say) by the addition and interpolation therein next after the following clause thereof (that is to say), "and to sail from there for Liverpool on or before the 15th March next," of the stipulations following (that is to say), "wind and weather permitting with cargo or in ballast for ship's benefit." And the defendants further say that the said alteration was not made in correction of any mistake originally made in the framing of the said agreement or to further the intentions of the parties thereto. By reason of which said several premises in this plea aforesaid the said

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agreement became void, and was and is void in law and of none effect.

Replications.—First: the plaintiff takes and joins issue on the pleas of the defendant respectively.

Secondly, to second plea.—That before the time mentioned in the charter-party for the sailing of the said ship from Amsterdam, the defendants wholly refused and declined to load the said ship according to the charter-party, or otherwise to perform the said charter-party on their part, and then wholly repudiated the said charter-party.

Thirdly, to second plea.—That the said ship was prevented sailing from Amsterdam on or before the said 15th day of March in the charter-party mentioned, by certain causes excepted from the charter-party, to wit, by the dangers and accidents of the seas and navigation and by the act of God, or by some or one of such causes.

Fourthly.—Demurrer to second plea.

Fifthly, to third plea.—That the said addition and interpolation in the third plea mentioned was made without the knowledge, consent, or privity of the plaintiff, by a stranger, to wit, one Hearn, who forthwith informed the defendants thereof, and then and there and before the time for performing the said charter-party in any respect had arrived, and before any repudiation thereof by the defendants on the ground of the said addition and interpolation, offered the defendants to strike out the said addition and interpolation, if the defendants objected thereto; but the defendants did not then object to accept or perform the charter-party on the ground of such addition and interpolation having been so made as aforesaid: that afterwards and as soon as the defendants did object to the said addition and interpolation, and before the time for performing the charter-party in any respect had arrived, the said stranger wholly struck out and erased the said addition and interpolation.

from the charter-party, and then returned the charter-party to the defendants in the same state and condition in which it was when executed by the parties, except as to the said erasure. And the plaintiff further says that the defendants never were prejudiced by the said interpolation and addition having been so made, struck out and erased as aforesaid.

Rejoinders.—Joinder of issue on the special replications.
Joinder in the demurrer to the second plea.

Demurrs to the second and third replications to the second plea.—Joinders therein.

At the trial, before *Willes*, J., at the last Liverpool Assizes, the following facts appeared:—In February, 1856, Messrs. Van Santen & Hearn, ship-brokers at Liverpool, negotiated with the defendants, merchants at that place, for the charter of a vessel called the “Zwaan” belonging to the plaintiff a merchant at Amsterdam. On the 28th February the defendants signed the charter-party, and on the same day Mr. Hearn sent it by post to the plaintiff at Amsterdam, where it arrived on the 2nd March. The plaintiff signed the charter-party, and on the 4th of March sent it back to Messrs. Van Santen at Liverpool. The charter-party (so far as material to the present questions) was as follows:—

“ Liverpool, 28th February, 1856.

“ Van Santen & Hearn, Liverpool.

“ It is this day mutually agreed between H. G. Croockewit, owner of the good ship or vessel called the “Zwaan” of Amsterdam, of the burthen of 494 Dutch tons or thereabouts, now in Amsterdam, and to sail from there to Liverpool on or before the 15th March next, whereof is master, of the one part, and Messrs. G. H. Fletcher & Co. of Liverpool, merchants and charterers, of the other part: That the said ship being tight, staunch, and strong, and in every way fitted for the voyage, shall with all convenient

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speed be made ready and receive and take on board a full and complete cargo, or as much lawful goods and merchandize, including specie and machinery, as the said charterers or their agents shall tender alongside for shipment, not exceeding what she can reasonably stow and carry over and above her cabin tackle, apparel, &c.; and being so loaded and dispatched, the said vessel shall with all possible speed sail and proceed to Batavia or Sourabaya, or so near thereto as she may safely get, and there deliver the said cargo in the usual and customary manner agreeably to bills of lading; restraints of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies throughout this charter-party always excepted; on being paid freight of 2*l.* per Dutch register ton. (Then followed provisions as to the payment of the freight, demurrage, &c.)

“H. G. Croockewit,  
 “G. H. Fletcher & Co.”

Evidence was adduced on the part of the defendants, to prove that they signed the charter-party on condition that it was returned to them by the first post. On this point, as on others, there was contradictory evidence. Mr. Hearn, who was a witness for the plaintiff, stated that he received back the charter-party on the 6th March after 6 o'clock, p.m.: that on the following morning at his own office he made a mark, which was erased at the time of the trial, at the end of the word "March," and made a similar one at the left-hand margin of the charter-party, and then wrote the following words alongside the margin, "wind and weather permitting with cargo or in ballast for ship's benefit;" and he then took the charter-party to the defendant Fletcher at the exchange rooms and there stated to him that he had received back the charter and had made the note in the margin, which he said did not affect it: that

the defendant stated that the marginal note altered the matter and that he did not know if he would then accept the charter; that he (Mr. Hearn) then said that he had put in the marginal note on his own responsibility, and not by the plaintiff's orders, with a view to avoid further differences, and would strike it out at once; that the defendant said he would see a gentleman who was jointly interested with him in the charter and let the witness know what was said: that he left the charter-party with the defendant and received it back in the afternoon of the same day with the following note:—

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“7th March, 1856.

“Dear Sirs,—The owners of the Zwaan have not sent back the charter of the vessel by return of post as was stipulated, and have moreover inserted a clause, subsequent to our having signed, to which we cannot agree and we must beg therefore to decline the vessel, and we return the charter-party.

“Your's truly,  
“G. H. Fletcher & Co.”

The witness further stated that upon the receipt of this note he struck out the words which he had written in the margin, and upon the same day wrote the following letter to the defendants:—

“7th March, 1856.

“Dear Sirs,—We have your note of this day respecting the charter-party per “Zwaan,” and in reply beg to say that the vessel was finally accepted by Telegraph on the 28th ulto., in conformity with the charter-party signed by yourselves on that date. We must therefore hold you to the contract as so entered upon.—The charter-party drawn up to confirm the agreement was returned, accepted without delay by the owner, and although a marginal note was inserted to render the document in conformity with one sent

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us from Amsterdam, this addition has since been struck out and does not now in any respect prejudice the original charter-party as accepted by yourself.

"We remain, &c.,

"Van Santen & Hearn,"

In answer to this letter the defendants wrote as follows:—

"8th March, 1856.

"Dear Sirs,—We have received your favored note of yesterday, which refers to a Telegraphic communication from your friends in Amsterdam of the 28th ulto. We don't find that you have given us any notification previously regarding this, but even if you had, we take it that such communication merely referred to the bare question of price and would not enter into detail of charter clauses. These latter, as offered by us, were set forth in a memorandum of charter-party signed by us, which you submitted to your friends in Amsterdam; and as these gentlemen did not accept our offer as made, but on the contrary returned the memorandum of charter with the insertion of new conditions, we immediately declined the vessel altogether and gave you written notice to that effect.

"We are, &c.,

"G. H. Fletcher & Co."

The following letters then passed.

"10th March, 1856.

"Dear Sirs,—We have to acknowledge receipt of your Saturday's favor, and in answer to what you then say about the Telegraph communication of the 28th ulto. from Amsterdam, could point out that such was left in your possession along with the memorandum of charter drawn out upon it by the writer: after receiving back the latter accepted and signed, the same was made known at once by wire to the owner, and the document itself sent forward

by that evening's post for his confirmation and signature. This was given to it without any alteration or delay on the owner's part, and the slight marginal note was appended after its return to our hands simply for the reason explained in our previous note, and because the points there expressed negatively belonged to the document itself. As, however, you objected to our making any additional notes upon the charter-party, we at once struck out the same, and thus have done away with all complaints as to the contract being in any way altered in its integrity after receiving the attestation of yourselves and the owners.

“We are, &c.,
“Van Santen & Hearn.”

“10th March, 1856.

“Dear Sirs,—We have received your favor of this day in which you own receipt of our notes to you of the 8th instant. We can however repeat that as the charter-party of the “Zwaan,” which we signed and handed to you for transmission to and acceptance of the owners of that vessel, was not agreed to by those gentlemen, but on the contrary was returned to us by you encumbered by the introduction of new clauses to which we were not parties, we at once gave you formal written notice that we declined the vessel altogether, which we confirm.

“We are, &c.,
“G. H. Fletcher & Co.”

The charter-party, with the marginal note struck out, was sent to the Stamp Office, and was duly stamped.

The ship did not sail for Amsterdam, on the 15th of March, in consequence of what was agreed between the parties to be taken as “the act of God;” but sailed on the 18th, and on the 20th Messrs. Van Santen and Hearn sent

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to the defendants a copy of the charter-party without the marginal note. The defendants wrote to them as follows:—

“ 20th March, 1856.

“ Dear Sirs,—We are quite at a loss to know why you should send us this afternoon a charter-party by the Zwaan for Batavia, for we gave you formal written notice so far back as the 7th instant; that in consequence of the owners of the vessel having failed to accept our written offer of charter on the conditions on which it was made, but having, on the contrary, tampered with the document, inserting new clauses to suit their own purposes, we declined the vessel altogether. We therefore return the charter-party which you have now sent us after a lapse of thirteen days.

“ We are, &c.,

“ G. H. Fletcher & Co.”

The ship arrived in Liverpool on the 30th March, and was then tendered to the defendants, who refused to accept her. The following letters then passed between Messrs. Van Santen & Hearn and the defendants.

“ Liverpool, 8th April, 1856.

“ Dear Sirs,—We beg to inform you that we have received instructions, from the owners of the Zwaan, to do the needful on their behalf, since you have given notice of the 7th March, and by subsequent notes that you declined the vessel. We are, therefore, about taking a recharter for the vessel, but, before finally closing, are anxious to give you every opportunity to revise the motives which, according to your opinion, will justify your conduct. Our notes of the 7th and 10th instant have offered you an ample explanation upon the two points of complaint; and as to the actual not sailing to the date of the ship, it was caused by stress of weather, of which we can give you a satisfactory proof, a copy and translation of the Harbour

Master's certificate to that effect. As we have a desire to prevent difficulties arising between yourselves and us, and can facilitate the loading of the Zwaan by 800 crates which we have to ship to Sourabaya, we may be able to facilitate the transaction for you, which we are willing to do. And we now beg to intimate that we shall delay rechartering the Zwaan until to-morrow 12 o'clock A.M., to give you time to withdraw your notice and accept the ship. If not done so we must act by instructions, recharter the vessel, and claim upon you the difference, if any, but we trust that you will prevent it.

“We are, &c.,
“Van Santen & Hearn.”

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“The undersigned Harbour Master, and Dock Master of this Town, declares that the Dutch Barque Zwaan, K. S. Van Hemert, Mr., has been cleared outwards on the 13th instant, as can be proved on the Register of my Office; that continual strong gales, and more particularly low tides, have prevented the ship to pass the gates as has been certified to me by the second Harbour Master.

“Amsterdam, 18th March, 1856,
“Harbour and Dock Master,
“J. Vische.”

“9th April, 1856.

“Dear Sirs,—We have no other reply to make to your letter of yesterday, except to refer you to our letter dated the 7th March last.

“We are, &c.,
“G. H. Fletcher & Co.”

It was objected, on the part of the defendant, first, that the stipulation in the charter-party, that the ship should

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sail from Amsterdam for Liverpool on or before the 15th of March was a condition precedent, and that notwithstanding she was prevented from so doing by the act of God, the defendants were not bound by the charter-party. Secondly, that the writing of the words in the margin of the charter-party was an alteration, in a material part, which rendered it void. The learned Judge reserved the points, and only left it to the jury to say whether the charter-party was to be returned from Amsterdam by the first post. The jury found a verdict for the plaintiff, and leave was reserved to the defendants to move to enter a verdict for them.

A rule Nisi having been obtained accordingly, it was agreed that the Court should dispose of the demurrsers at the time of the argument of the rule.

Edward James and *Quain* shewed cause against the rule, and also supported the demurrsers (*a*).—First, the stipulation that the vessel should sail from Amsterdam for Liverpool on or before the 15th March, was qualified by the exception which extended "*throughout the charter-party*." The vessel was prevented from sailing on that day by the act of God, and consequently the condition was discharged. In *Shep. Touchst.* "Condition," p. 157, it is said: "If a condition be possible in its creation, and after become impossible by the act of God, the condition is discharged and gone for ever, and the estate is absolute." So, in *Co. Lit.* 206, *b.*, it is said: "In all cases where a condition of a bond, recognizance, &c., is possible at the time of the making of the condition, and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there the obligation, &c., is saved." The law is stated in similar terms *Roll. Abr.*

(*a*) Hilary Term, January 23.

Condition (G.), "Quid voilt excuser le performans dun Condition." Here the condition was possible at the time the contract was entered into; but was rendered impossible by a power over which the plaintiff had no controul. The stipulation is in the nature of an agreement for the breach of which an action may be maintained. It is not a condition precedent. *Ollive v. Booker* (a), *Oliver v. Fielden* (b) and *Glaholm v. Hays* (c) will be relied on by the other side, but the question depends on the intention of the parties, to be collected from the instrument itself. Those cases were decided upon a supposed analogy to cases of insurance. But, in contracts of insurance, the basis of the contract is the existence of a certain state of facts, such as the sailing on a particular day, with convoy, or the like. In a charter-party the contract is different; the hirer may be compensated in damages for the failure of any particular stipulation: *Hall v. Cazenove* (d). [Martin, B.—Can this case be distinguished from *Glaholm v. Hays* (c)?] In *Constable v. Cloberie* (e) it was held, that a covenant that a ship should sail with the next wind was not a condition precedent. [Martin B.—There the substance of the covenant was that the vessel should sail on the particular voyage, and the voyage had been actually performed. The subject of conditions precedent was considered by this Court in *Graves v. Legg* (f).] In *Tarrabochia v. Hickie* (g) the stipulation in a charter-party, that the vessel should sail with all convenient speed, was held not to be a condition precedent. That case shews that the second plea is bad, because it does not allege that the object of the voyage was

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(a) 1 Exch. 416.

(d) 4 East, 477.

(b) 4 Exch. 135.

(e) Palm. 397.

(c) 2 Man. & G. 257; 2 Scott,

(f) 9 Exch. 709.

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(g) *Anlē*, p. 183.

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frustrated by the delay. *Clipsham v. Virtue* (*a*) is to the same effect. In *Ollive v. Booker* (*b*) the plea was framed so as to shew that the object of the contract was frustrated. The exception is for the benefit of the owner. If the exception had been "during the voyage," it might not have applied when the vessel was in dock; but "throughout the charter-party" is a wider term (*c*). The words were probably introduced on account of the peculiarity of the navigation at Amsterdam. [Martin, B.—If there had been an embargo for a year, would the defendants have been bound to take the vessel after that?] As to the second replication to the second plea.—The charter-party was repudiated before the 15th of March, and upon that the plaintiff might have immediately brought his action; *Hochster v. De La Tour* (*d*). [Pollock, C. B.—It can hardly be contended that if a man gave notice, before a bill of exchange was due, that he would not pay it, that would be a breach. There are certain contracts which a person may put it out of his power to perform. *Watson*, B., referred to *Reid v. Hoskins* (*e*) and *Avery v. Bowden* (*f*).] It does not appear on the record but that the repudiation was accepted immediately. [Martin, B.—The declaration does not allege it as a breach.] The repudiation was a waiver of the condition that the vessel should sail on the 15th. There is a difference between a condition and a covenant; a condition may be waived though a covenant cannot: *West v. Blakeway* (*g*), *Cort v. The Ambergate Railway Company* (*h*).

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| (<i>a</i>) 5 Q. B. 265. | (<i>e</i>) 5 E. & B. 729. In error, |
| (<i>b</i>) 1 Exch. 416. | 6 E. & B. 953. |
| (<i>c</i>) They referred to <i>Bruce v. Nicolopulo</i> , 11 Exch. 129; <i>Crow v. Falk</i> , 8 Q. B. 467. | (<i>f</i>) 5 E. & B. 714. |
| (<i>d</i>) 2 E. & B. 678. | (<i>g</i>) 2 Man. & G. 752. |
| | (<i>h</i>) 17 Q. B. 127. |

Secondly, as to the insertion of the words in the margin of the charter-party.—This alteration did not render the charter-party void; because the stipulation was already in it by implication of law. The contract was entered into on the 28th of February, to sail to Liverpool on the 15th March, and there receive a cargo. Until the time arrived for receiving the cargo the owner was entitled to the beneficial enjoyment of the vessel. The entire right of using the vessel, except so far as it is actually granted to the charterer, remained in the owner: *Mitcheson v. Nicol* (*a*), *Neill v. Ridley* (*b*). Being in a foreign port, the vessel must, of necessity, proceed to Liverpool either in ballast or with a cargo; and as the charter was silent on the subject, the owner had a right to use the vessel as he thought fit, provided he did not prevent the merchant from loading according to the terms of the contract. If a person agreed to grant a lease of a house at a future day, it is clear that he might let it to a third person until the commencement of the lease. So in the case of a job master, who undertakes to provide a carriage and horses during several months in the year, he is entitled to the use of them at other periods. In like manner, so long as the plaintiff brought the vessel from Amsterdam to Liverpool, as required by the charter-party, he had a right to bring her either with cargo or in ballast. The insertion of those words was, therefore, immaterial, for they added nothing to the contract: *Sanderson v. Symonds* (*c*), *Clapham v. Cologan* (*d*). Moreover there was no alteration, in fact, but a mere proposal by the one party, which was not accepted by the other. No case has gone to the extent

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(*a*) 7 Exch. 729.(*c*) 1 Brod. & B. 426.(*b*) 9 Exch. 677.(*d*) 3 Camp. 382.

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that a mere proposal for an alteration will avoid an agreement. But assuming that it was an alteration and in a material particular, yet as it was made by a stranger it did not vitiate the contract. In *Henfree v. Bromley* (*a*) an award was altered by the umpire after it was made and ready for delivery, and it was held that such alteration was no more than a mere spoliation by a stranger, and did not vacate the award. So here, the alteration was made by a third person, to whom the charter-party was delivered for the purpose of handing it over to the defendants. A third person who cancels an acceptance by mistake, having no authority so to do, does not thereby render the bill void: *Raper v. Birkbeck* (*b*). *Davidson v. Cooper* (*c*) is distinguishable, inasmuch as there the instrument was altered, in a material part, whilst in the possession of the person to whom it belonged. [Watson, B.—There the guarantee would have been void without the seal.] That, in fact, shews that the alteration was fraudulent. The law is thus stated in the note to *Master v. Miller* by the learned editor of Smith's Leading Cases, vol. 1, p. 720, 4th ed. “Since the decision of this case it has never been doubted that a material alteration in a bill or note, *not satisfactorily accounted for*, operates as a satisfaction thereof, except as against parties consenting to such alteration.” Here the broker, by whom the alteration was made, was a mere stranger to the plaintiff, and there is no suggestion of any fraud. In *Barchfield v. Moore* (*d*) the instrument was a bill of exchange, and it was altered by a person who was interested and from whom the plaintiff took it.

Wilde, in support of the rule.—The cases clearly establish

(*a*) 6 East, 319.

error, 13 M. & W. 343.

(*b*) 15 East, 17.

(*d*) 3 E. & B. 683.

(*c*) 11 M. & W. 778. In

that the words "sail from Amsterdam on or before the 15th of March" constitute a warranty. In *Barker v. Windle* (*a*), where the description of a vessel in a charter-party, "as of the measurement of 180 to 200 tons or thereabouts," was held not to be a warranty, *Jervis*, C. J., pointed out that the real criterion whether such a statement forms a condition precedent is, whether it goes to the profit and foundation of the voyage; and that if a warranty, a variance to the extent of a single ton, would be fatal. Then it is said that the alteration was only a proposal. Every alteration is a proposed alteration. Here the instrument was in point of fact altered and its integrity destroyed while in the hands of the broker who had the custody of it, as agent for the plaintiffs. [*Watson*, B.—Suppose both parties had died, possibly no one could have explained the alteration.] The alteration was material. One party thought it for his interest to insert it, the other at once threw up the charter-party because, by the alteration, it became a different contract. The Court, therefore, cannot say that the alteration was immaterial.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This was an action upon a charter-party, tried before my brother *Willes* at the last Liverpool Assizes, when a verdict was found for the plaintiff with leave to the defendant to move upon all the points which arose at the trial. Owing to the very peculiar state in which the matter in controversy has been submitted by the parties for our judgment—we being called upon, first, to decide upon the rights of the parties upon the real facts of the

(*a*) 6 E. & B. 675.

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case as proved at the trial, and secondly, upon three demurrers arising on the pleadings,—we think it better, in the first instance, to state our opinion upon the real facts as proved, which are very short and simple.

In February, 1856, Messrs. Van Santen & Hearn, who were ship brokers at Liverpool, negotiated with the defendant, who is a merchant there, for the charter of a ship called the "Zwaan," then at Amsterdam, belonging to the plaintiff who resided there. The result was, that on the 28th of that month the defendants signed a charter-party, which contained a stipulation that the ship was to sail from thence to Liverpool on or before the 15th of March next, and which was to be forwarded, by Messrs. Van Santen & Hearn, to Amsterdam, for the signature of the plaintiff. The charter-party was signed by the plaintiff, and returned by him to Messrs. Van Santen & Hearn after the expiration of a few posts. The only point submitted to the jury at the trial was, whether the charter-party was to be returned by the first post from Amsterdam, which was stated by the defendant to be the agreement between him and Messrs. Van Santen & Hearn. The jury found this point in favour of the plaintiff. Upon the other points in the case, the evidence of Mr. Hearn and of the defendant was somewhat contradictory; but as the opinion of the jury was not taken upon them, we assume that the evidence of Mr. Hearn was, in every respect, true. (His Lordship then stated the evidence of Mr. Hearn, and read the correspondence as above set forth, p. 897.)

Upon this state of facts, two objections were made by the defendant; first, that the stipulation in the charter-party that the ship was to sail from Amsterdam for Liverpool on or before the 15th March was a condition precedent, and notwithstanding that she was prevented from so doing by the act of God, that the defendant was not bound to accept

her; and secondly, that the writing by Mr. Hearn of the marginal note in the charter-party was an addition or alteration which rendered the charter absolutely void; and we are of opinion that both objections are well founded.

The charter-party begins thus:—It is this day mutually agreed between (the plaintiff), owner of the good ship or vessel called the *Zwaan* of Amsterdam, &c., now in Amsterdam, *and to sail from thence for Liverpool on or before the 15th March next*, whereof is master of the one part, and (the defendant), of Liverpool, merchant and charterer of the other part; that the said ship being tight, staunch, &c., shall, with all convenient speed, be made ready," as in the usual printed form of charter-party, but the exception was as follows:—"Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates and enemies throughout this charter-party always excepted." There was no other part of the charter-party relied on by the plaintiff as material.

If the word "*throughout*" had not been in the charter-party, the case of *Glaholm v. Hays* (a) is a direct authority, expressly in point, that the stipulation as to sailing on the 15th March was a condition precedent, and this case has been acted upon in two cases in this Court; *Ollive v. Booker* (b) and *Oliver v. Fielder* (c). If we had thought this decision not correct, we should nevertheless have considered ourselves bound by it; but we entirely concur in it, and are of opinion that it was rightly decided, and that any other construction of the charter-party would lead to most mischievous consequences. All mercantile contracts ought to be construed according to their plain meaning to men of sense and understanding, and not according to forced and refined constructions which are

(a) 2 Man. & G. 257.

(b) 1 Exch. 416.

(c) 4 Exch. 135.

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intelligible only to lawyers, and scarcely to them. We entirely agree with the judgment of the Lord Chief Baron in *Tarrabochia v. Hickie* (*a*), who clearly points out the distinction between a stipulation to sail on a particular day and any general stipulation as to sailing in a convenient time, or other words of this description. Then, does the word "throughout" make any difference? We think it does not, it might perhaps operate to exonerate the plaintiff from an action in the event of the ship being prevented from sailing on the 15th March by any of the matters excepted; but we think it does not affect the condition precedent upon the performance of which the defendant contracted to take and load the ship.

It may be observed, that if the plaintiff was not bound by the stipulation that the ship was to sail on the 15th March, it is difficult to see that he was bound that the ship was to sail from Amsterdam at all, and unless the stipulation be deemed a condition precedent, there is very great difficulty in ascertaining what is the contract of the plaintiff in this respect.

We also think that the addition to or alteration of the charter is a fatal objection to the plaintiff's right to maintain this action. It is, no doubt, apparently a hardship, that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind, that to permit any tampering with written documents would strike at the root of all property, and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts; but that they

(*a*) *Ante*, p. 186.

should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, rasure or obliteration ; but, upon this point, the case of *Davidson v. Cooper* (*a*) is conclusive. No case can possibly be entitled to more weight than this. Lord *Abinger*, in giving judgment, stated that the Court had arrived at their judgment after much reflection ; and Lord *Denman*, in delivering the judgment of the Court of error, stated that the Court had arrived at their conclusion after much doubt, and the judgment is, that a party having the custody of an instrument for his own benefit is bound to preserve it in its original state. It was said that Mr. Hearn was a stranger to the plaintiff; he certainly was not, for he was the agent of the plaintiff to deliver the charter-party to the defendant; but even if he were, the rule in *Pigott's Case* (*b*) is, "that when any deed is altered in a part material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line or through the midst of a material word, the deed thereby becomes void ;" and Lord *Denman*, in his judgment, stated that *Pigott's Case* had never been overruled ; but, on the contrary, extended to unsealed documents ; and as we think that the stipulation as to sailing on the 15th March was a condition precedent, the addition to it of "wind and weather permitting" was a material alteration, and, we think, avoids the instrument. It is unnecessary to refer to the other words which were added ; but we think it right to add that a very great deal of argument and statement upon the subject of alteration was addressed to us by the learned counsel for the plaintiff, in which we do not at all concur. Upon all the issues in fact therefore, except the

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first, we are of opinion the defendant is entitled to have the verdict entered for him, and if the replication to the third plea had been proved, which we think it was not, the defendant would, in our opinion, have been entitled to judgment non obstante veredicto upon it.

We have now to dispose of three demurrers. In order to do so, it is necessary to ascertain the true meaning of the declaration. It begins by setting out the charter-party verbatim; it then avers in the manner permitted by the Common Law Procedure Act, 1852, that the plaintiff did all things necessary on his part, and every thing happened and was performed that ought to have happened and been performed in order to entitle him to the performance by the defendant of the charter-party, and to have the agreed cargo loaded on board the ship, and for breach alleges that the defendant made default in loading the agreed cargo and wholly refused to load the ship or otherwise perform the said contract, and *wholly repudiated the said charter-party.*

The 57th section of the Common Law Procedure Act, permits the plaintiff to aver the performance of conditions precedent generally, but forbids the defendant to deny it generally and makes it incumbent upon him to specify the condition the performance of which he intends to contest. There is nothing to enable the plaintiff to dispense with averring any matter which he deems to be a waiver of a condition precedent; and it is quite clear that what the plaintiff declares on, and the breach of which he complains, is the not loading a cargo on board the ship at Liverpool, to which place she had come. The defendant pleaded a second plea, setting out the charter-party verbatim, the printed part in black ink and the written part in red ink, and averred that the ship did not sail from Amsterdam for Liverpool on or before the 15th March. The plaintiff

demurred to this plea. For the reasons already given we think the plea good, and that the plaintiff is entitled to our judgment upon it.

The plaintiff besides pleaded by way of replication to this plea, that before the time for sailing of the ship from Amsterdam the defendant refused and declined to load the ship, or otherwise perform the charter-party, and wholly repudiated it: to this replication the defendant demurred. A most extraordinary argument was addressed to us upon this replication on behalf of the plaintiff. First, it was said that it amounted to an allegation of a waiver or dispensation of the performance of the condition precedent of sailing on the 15th March. The answer to this is twofold; first, that it does not state anything of the kind, and secondly, that if it did it would have been a departure from the declaration which in substance alleges that the ship sailed upon or before that day, which would have been fatal to the pleading as a replication. It was next argued, that it being there averred that the defendant repudiated the charter-party, that this related to what took place on the 7th March and that this of itself constituted a breach of the contract contained in the charter-party and entitled the plaintiff to judgment, and a case of *Hochster v. De la Tour* (*a*) was cited.

We do not mean to dissent from the judgment in this case, but Lord *Campbell*, in the cases of *Reed v. Hoskins* (*b*) and *Avery v. Bowden* (*c*), clearly shews that it has no application to such a case as the present, in which the plaintiff insisted upon the performance of the charter-party and sent his ship to Liverpool in order to have her loaded by the defendant. In addition to this, as has already been observed, the breach alleged in the declaration is the not loading the ship at Liverpool, and the alleged repudiation

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(*a*) 2 E. & B. 678.

(*b*) 3 E. & B. 729.

(*c*) 5 E. & B. 714.

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of the contract is mere surplusage. We therefore think this replication is bad.

It was next replied to the same plea that the ship was prevented from sailing from Amsterdam by the act of God, and to this there was also a demurrer. For the reasons already given, we think this replication also bad. The judgment therefore will be for the defendant.

Judgment for the defendant.

Feb. 21.

PYER v. CARTER.

Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and is subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose.

The plaintiff's and defendant's houses adjoined each other. They had formerly been one house and were converted into two by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that the plaintiff took a conveyance of his house. At the times of these conveyances, a drain ran under the plaintiff's house and thence under the defendant's, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into a drain on the plaintiff's premises and thence through the drain into the common sewer. The plaintiff's house was drained through this drain.—*Hold*, that the plaintiff was, by implied grant, entitled to have the use of the drain as it was used at the time of the defendant's purchase of his house.

flowing from the plaintiff's said messuage and premises, and flooded, soaked into and injured the same, &c.

Pleas.—First: not guilty. Secondly: that the plaintiff was not entitled to the said drain, sewer, and passage for water; nor did the rain and water from the plaintiff's said messuage and premises of right flow, nor ought to flow, away from the plaintiff's said messuage and premises through the said drain, sewer, and passage for water as alleged.—Issues thereon.

At the trial, before *Bramwell*, B., at the last Lancashire Summer Assizes, it appeared that the plaintiff and defendant were owners of adjoining houses situate in St. Anne Street, Liverpool. These houses had been formerly one house, and had belonged to a person of the name of Williams, who converted them into two houses. In July, 1853, Williams conveyed the defendant's house to him in fee. This conveyance contained no reservation of any easement. In September, 1853, Williams conveyed the plaintiff's house to him in fee. At the time of these conveyances a drain or sewer ran under the plaintiff's house and thence under the defendant's house and discharged itself into the common sewer in St. Anne Street. Water from the eaves of the defendant's house fell on the plaintiff's house, and from thence flowed down a spout into the drain on the plaintiff's premises, and so into the common sewer. The defendant blocked up the drain where it entered his house, and in consequence, whenever it rained, the plaintiff's house was flooded. The defendant stated that he was not aware of the drain at the time of the conveyance to him. It was proved that the plaintiff might construct a drain directly from his own house into the common sewer at a cost of about 6*l.*

It was submitted on the part of the defendant, that the plaintiff had no right to the use of the drain under the defendant's house. The learned Judge directed a verdict

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for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Hugh Hill, in the following term, obtained a rule nisi accordingly, on the ground that the facts proved did not establish the plaintiff's right to the easement claimed by him.

Edward James (with whom was *Raffles*) shewed cause (Jan. 16 & 18).—When the owner of the entire property conveyed the one house to the defendant, the right to use the drain continued as an easement necessary for the enjoyment of the other house. It was competent for the owner to impress such a character on the property that whilst in the hands of different individuals one tenement should be subservient to the other. If the dominant tenement had been first conveyed, it is clear that the plaintiff would have been entitled to the right claimed; and it makes no difference that the servient tenement was first conveyed. When a person grants anything, he impliedly grants all that is indispensable for the full enjoyment of the thing granted. If this claim had been of a right of way, the plaintiff would, under these circumstances, have been entitled to it: *Pinnington v. Galland* (*a*); and there is no distinction in principle between that case and the present. The purchaser of one of several heritages takes it with the disposition which the owner of them has made for their respective use, whether it be a benefit or a burthen: *Nicholas v. Chamberlain* (*b*), *Robins v. Barnes* (*c*): Gale on Easements, p. 49, 2nd ed. The principle extends not only to rights of way but to the right to light, *Palmer v. Fletcher* (*d*); the right to water, *Canham v. Fisk* (*e*), and the right to support: *Richards v. Rose* (*f*), *Peyton v. The Mayor of London* (*g*).

(*a*) 9 Exch. 1.

(*d*) 1 Lev. 122; 1 Sid. 167.

(*b*) Cro. Jac. 121.

(*e*) 2 C. & J. 126.

(*c*) Roll. Abr. "Extinguish-
ment," (D.) p. 7.

(*f*) 9 Exch. 218.

(*g*) 9 B. & C. 725.

The right is not derived from any implied exception or reservation of the grantor, but it exists because the easement is necessary for the enjoyment of the thing granted : 1 Wms. Saund. 323, note (s). Such an easement is not extinguished by unity of ownership, unless the owner has availed himself of his right to destroy the external mark of it as by cutting a spout or removing the eaves of a house: *Sury v. Pigott* (a)—He also cited *Riviere v. Bower* (b).

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*Hugh Hill* and *Mellish*, contrâ.—The conveyance to the plaintiff contained no express words of exception or reservation in respect of this drain, nor any words which will raise the inference of a grant. Then what will the law imply? In Gale on Easements, p. 49, 2nd ed., it is said, “The implication of the grant of an easement may arise in two ways: First, upon the severance of a heritage by its owner into two or more parts; and secondly, by prescription. In the first of those cases the easement exists because it is *necessary*. Here, however, the easement is not of necessity, since the plaintiff might construct a new and more convenient drain at a trifling expense. *Pinnington v. Galland* (c), and the other cases relied on, proceeded on the ground that the rights claimed were easements of necessity. No doubt, the owner of two heritages may impress upon them certain qualities, by which the one is benefitted and the other burdened; but this disposition will not bind the property when conveyed to different owners, unless the servitude is not only necessary, but also apparent and continuous: Gale on Easements, p. 53, 2d ed. In this case the defendant was not aware of the existence of the drain at the time of the conveyance

(a) Palmer, 444.

(b) Ry. & M. 24.

(c) 9 Exch. 1.

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for the plaintiff, reserving leave to the defendant to enter a verdict for him.

*Hugh Hill*, in the following accordingly, on the ground that he could not establish the plaintiff's right to the land, directed a verdict for him.

*Edward James* (with the plaintiff) (Jan. 16 & 18).—The plaintiff's house was tried at the trial, when a verdict was given for the plaintiff. A motion was made to enter judgment for the plaintiff, in pursuance of leave reserved at the trial. The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were subsequently divided into two houses by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that conveyance the plaintiff took a conveyance of his house. At the time of the respective conveyances the drain ran under the plaintiff's house and then under the defendant's house, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into the drain on plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was proved that, by the expenditure of £1, the plaintiff might stop the drain and drain directly from his own land into the common sewer. It was not proved that the defendant, at the time of his purchase, knew of the position of the drains.

Under these circumstances we are of opinion, upon reason and upon authority, that the plaintiff is entitled to judgment. We think that the owners of the plaintiff's house are bound to pay the expenses of the plaintiff.

(a) 16 M. & W. 484.

(c) 12 M. & W. 324.

(b) 9 Exch. 218.

house are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole. The authorities are strong on this subject. In *Nicholas v. Chamberlains* (*a*), it was held by all the Court that, "if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto, and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So if a lessee for years of a house and land erect a conduit upon the land, and after the term the lessor occupies them together for a time, and afterwards sells the house with the appurtenances, to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them," *Shury v. Pigott* (*b*), and the case of *Coppy v. I. de B.*, 11 Hen. 7, 25, pl. 6, support this view of the case, that where a gutter exists at the time of the unity of seisin of adjoining houses

(*a*) Cro. Jac. 121.

(*b*) Popham, 166; S. C. 3 Bulst. 339.

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it remains when they are aliened by separate conveyances, as an easement of necessity.

It was contended, on the part of the defendant, that this pipe was not of necessity, as the plaintiff might have obtained another outlet for the drainage of his house at the expence of 6*l*. We think that the amount to be expended in the alteration of the drainage, or in the constructing a new system of drainage is not to be taken into consideration, for the meaning of the word "necessity" in the cases above cited and in *Pinnington v. Galland* (*a*) is to be understood the necessity at the time of the conveyance, and as matters then stood without alteration; and whether or not at the time of the conveyance there was any other outlet for the drainage water, and matters as they then stood, must be looked at for the necessity of the drainage.

It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, and if he had inquired he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. Gale (Gale on Easements, p. 53, 2nd ed.) that by "*apparent signs*" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase; and therefore we think the rule must be discharged.

Rule discharged.

(*a*) 9 Exch. 1.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

RIGG v. THE EARL OF LONSDALE.

Feb. 7.

THIS was a proceeding in error on the judgment of the Court of Exchequer, upon the special case stated for the opinion of that Court in *The Earl of Lonsdale v. Rigg* (a).

Bretherdale
Bank is a tract
of inclosed
pasture land
within the
manor of Bre-
therdale in the

county of Westmoreland. Bretherdale Bank had been from time immemorial subject to eighty customary rights called cattlegates. The plaintiff was lord of the manor of Bretherdale. The defendant was seized of certain cattlegates as a customary estate of inheritance. The plaintiff was also owner of a cattlegate which came to his predecessor, as lord of the manor, by seizure quoique for nonpayment of a fine. Bretherdale Bank is separated from Bretherdale Waste by a fence which the cattlegate owners kept in repair with stones got from Bretherdale Bank and from the adjoining waste. Each cattlegate gave the owner thereof a right of depasturing on Bretherdale Bank a certain number of cattle and sheep from the 26th of May to the 24th of April, but neither cattle nor sheep were allowed to pasture there between 24th of April and the 26th of May. An alteration had been made in the time of stinting by substituting the 26th of May for the 1st of June; but it did not appear that the lord of the manor had any notice of the alteration, and the court rolls did not contain any mention of stinting. The whole of the cattle and sheep depastured Bretherdale Bank in common. A frithman was appointed by the cattlegate owners, whose duty it was to take care that Bretherdale Bank was properly stinted, and he was remunerated for his trouble by the cattle owners. A cattlegate owner having a house within the manor had also a right to cut peat for consumption in his house. By 46 Geo. 3, c. lxi., authority was given to the lord of the manor to enfranchise any copyhold or customary measeages, cottages, lands, tenements, or hereditaments, parcel of the manor; and several cattlegates were enfranchised under this Act; but there was no distinction in point of enjoyment between the enfranchised and the customary cattlegates. From time immemorial the cattlegates had been held of the lord of the manor as customary estates of inheritance by payment of fine certain, rents of small amount being payable annually for each cattlegate, and under dues, duties, suits, and services of right accustomed. On the death of a cattlegate owner, the cattlegate descended by custom to the heir at law, who was admitted at the lord's court, when he paid a fine. The cattlegates also passed by customary deed, followed by admittance at the next lord's court, or out of court by the steward of the manor. The deed was brought into Court by the alienee, and was presented by the jury or homage. A fine was payable on the admittance, but there was no heriot due. On the death of the lord of the manor, the owners of cattlegates could be compelled by the custom to be admitted by the new lord, and to pay a fine. The lord was entitled to seize quoique for nonpayment of fines. On alienation by a feme covert, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued, and killed grouse and other game on Bretherdale Bank, no other person having claimed to do so, or ever having done so except by their license. Since 1819 the lords of the manor have preserved the game.

In an action by the plaintiff against the defendant for shooting on Bretherdale Bank without the plaintiff's permission.—The first count was trespass for entering the plaintiff's close and

(a) See the case, 11 Exch. 654.

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Grant (*Watson* with him), argued for the plaintiff in error (the defendant below), in last Trinity Vacation (*a*) (June 17).—First, the owners of the cattlegates have an equal and undivided interest in the soil. It is objected that this is an inconvenient state of things; but the same objection would apply to a tenancy in common, or a joint tenancy, in the pasturage. The Inclosure Act, 8 & 9 Vict. c. 118, s. 113, empowers the commissioners to direct inclosed land to be “converted into and used as a regulated pasture, to be stocked and depastured in common by the persons interested therein, in proportion to their respective rights and interests.” The 41 Geo. 3, c. 109, s. 13, contains a similar provision. Secondly, these rights of cattle gates are not incorporeal hereditaments. That is shewn by the circumstance of their being held by rent service, for there can be no distress to recover rent of incorporeal hereditaments, and yet, until the Statute of Gloucester, 6 Edw. 1, c. 4, distress was the only means of enforcing payment of rent-service: Black. Consideration on Copyholders, p. 233. In Coke’s Copyholder, sect. 30, it is said, “No action of debt will lie for these annual services, no more than for corporal services.” Also in Co. Litt., 144 *a*, it is said, “Note, that a rent cannot be granted out of a pischary, a common, an advowson, or such like incorporeal inheritances, but out

killing grouse and other game there: the second, trover for grouse of the plaintiff: the third, case for the disturbance of the plaintiff’s exclusive right of shooting grouse on Bretherdale Bank. The defendant pleaded; first, not guilty, to the whole declaration: secondly, to the first count, that the land was not the land of the plaintiff: thirdly, to the first count, that the land was defendant’s soil and freehold: fourthly, to third count, a traverse of plaintiff’s exclusive right as claimed: upon which issues were joined. Proceedings in error having been taken on a special case stating the above facts.—*Held*, in the Exchequer Chamber, first, that the cattlegates gave the owners no right to the possession of the soil, but that the ownership of the soil remained in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners, and consequently the lord might maintain trespass against a cattlegate owner for sporting over it without his permission; and that on these pleadings the plaintiff was entitled to judgment on the first and second counts.

Secondly, that the facts stated did not warrant a judgment for the plaintiff on the third count.

(*a*) Before Coleridge, J., Wightman, J., Cresswell, J., Erle, J., Crompton, J., and Crowder, J.

of lands or tenements whereunto the grantee may have recourse to distrain." The same thing is shewn by the deed of bargain and sale, by which the vendor "granted, bargained, sold, aliened, released, surrendered, conveyed and confirmed to the vendee all the four cattlegates or beast-grasses," &c., "with all and singular lands, grounds," &c. If these cattlegates are incorporeal hereditaments, they cannot have other incorporeal hereditaments appurtenant to them. Then it is said that this is common in gross, but if so, it is sans nombre. Moreover common in gross cannot be granted over inter vivos, as these rights can; *Ackroyd v. Smith* (*a*). Thirdly, there are numerous authorities to shew that "cattlegate" is merely a name for a certain quantity of land; *Benington v. Goodtile* (*b*), *Metcalf v. Roe* (*c*). A cattlegate was a tenement within the 13 & 14 Car. 2, c. 12, for the purpose of gaining a settlement; *Rex v. Inhabitants of Whixley* (*d*). "Cows' grass" and "pasture gates" are convertible terms; *Miller v. Jackson* (*e*). A cattlegate gives a title to the soil; *Rol. Abr. tit. "Graunts"* (*E.*), *Rex v. Watson* (*f*), *Rex v. Inhabitants of Stoke* (*g*). Fourthly, their tenure shews that these cattlegates are not copyhold, for they are held by payment of rent and services, and not by copy of court roll. The service arises from the nature of the estate and not from custom, as in copyholds. All the incidents point the same way. The fine is a rent certain, not derogatory to the freehold character of the tenure. The 12 Car. 2, c. 24, which abolished tenures in capite and knights' service, expressly preserves rents certain, heriots, and fines on alienation; sects. 5, 6. It is only freeholders who can perform service by attorney; *Kitch.* 147;

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| (<i>a</i>) 10 C. B. 164. | (<i>d</i>) 1 T. R. 137. |
| (<i>b</i>) Vin. Abr. tit. "Ejectment"
(Q.), pl. 43, Andrews, 106. | (<i>e</i>) 1 Y. & J. 65, 73, 81. |
| (<i>c</i>) Andrews, 107. | (<i>f</i>) 5 East, 480, 483. |
| | (<i>g</i>) 2 T. R. 461. |

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2 Inst. 99. In this case the admittance is taken by the steward out of Court, but formerly a copyholder could be admitted by a steward out of court; Bro. Abrid. tit "Court Baron," pl. 22, *Doe d. Roberts v. Whitaker* (*a*). It is not every paper writing, purporting to be an admission, that proves the estate to be copyhold; *Palmer v. Johnson* (*b*). Neither is the fact, that the tenant is compellable to be admitted, inconsistent with a freehold tenure; *Passingham*, App., *Pitty*, Resp. (*c*). The admittance is merely for the purpose of registration; since the lord is entitled to know who are his freehold tenants, for without them he would lose his seigniorial rights. If, indeed, the case had found that the tenant could compel the lord to admit him, that might have been evidence of a copyhold tenure. Here there is no surrender or licence from the lord to alien, and the form of admittance shews that the lord grants nothing. But a copyhold tenant cannot alien his land without surrendering it to the lord; Lit., sect. 74. The parties have never treated this as copyhold, for the admittance is not stamped; but a steward who grants an unstamped admittance to a copyhold out of Court is liable to a penalty; 48 Geo. 3, c. 140, s. 32; and where more than one admittance is contained in the same piece of parchment there must be several stamps. It is said that the fact of the conveyance being by deed of bargain and sale shews that the tenure is less than freehold; but the same objection was raised in *Busher*, App., *Thompson*, Resp. (*d*), and held of no avail. The whole interest in the land passes by the bargain and sale, and that mode of conveyance being necessary shews that the tenure is freehold; *Bingham v. Woodgate* (*e*). The ancient mode of passing land was by

(*a*) 3 N. & M. 225.

(*b*) 2 Wils. 163, 164.

(*c*) 17 C. B. 299.

(*d*) 4 C. B. 48.

(*e*) Taml. 183, 198; 1 Russ. & M. 32.

deed of bargain and sale, which, when presented and inrolled in the manor Court, had the same operation, as a similar conveyance, under the Statute of Incrolements, 27 Hen. 8, c. 16: Kitchen on Courts, 494, *Parman v. Bouyer* (*a*). If it be said that a deed of bargain and sale, previously to the Statute of Usea, only operated to transfer a use, that is incompatible with the argument that these are rights of common; "since things which are mere rights cannot be conveyed by way of use, as commons, &c., ways in gross; for a man cannot walk over another's ground to the use of a third person:" Gilbert on Uses, p. 486, 3rd ed., 14 Hen. 8, fo. 7, B. From these considerations it follows that here there is a freehold tenure and a freehold interest and inheritance. Fifthly, the same thing is shewn by the acts of ownership. It was asked in the Court below whether the owners of these cattlegates could plough the land; it is submitted that they could, provided they all agreed to do so, just as tenants in common must agree as to the mode of using their land. Again, the frithman is not the officer of the manor, but is appointed by the owners of the cattlegates; and they change the times of stinting, which they could not do if custom regulated the management of this enclosed space. They, and not the lord, keep up the fences. A custom of a manor must extend throughout it. In Co. Lit., 78 b, it is said, "Of common intendment one part of a manor shall not be of another nature than the rest." A custom cannot prevail in a single field; Bro. Abr., tit. "Customes," pl. 66. The exception of shooting proves nothing, for the acts of shooting and appointing a game-keeper are no proof of ownership in the soil; *Tyrwhitt v. Wynne* (*b*). The lord has no separate right to the soil, but only in common with the other owners of cattlegates. Sixthly, the presumption of law, arising from the exclusive

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occupation of a number of persons, is that they are seized in fee. The case finds that, from time immemorial, this has been a pasture, and that the owners of these cattlegates can do on the land all acts which the owners of ancient pasture can do. Then, if they are entitled to the land in fee, they are *prima facie* entitled to the game upon it; 2 Blac. Com. 394; and it is necessary for the lord to shew that he has a right either by prescription, grant, or user. There can be no prescription, because grouse were formerly not game, and did not become so till the 9 Geo. 4, c. 69, s. 13, which enactment was adopted in the 1 & 2 Wm. 4, c. 32, s. 2. Prescription must be of such a nature, that before the time of legal memory it might have commenced by grant. Here it could not have commenced by grant from the Crown, for before the 2 Jac. 1, c. 27, the only game birds were the birds of warren, pheasants and partridges; others were only like sparrows or small birds. Neither could the prescription have commenced by grant from a subject; for if the right of soil is in the cattlegate owners, there never was a time at which they could have made an exclusive grant. But supposing that they made a grant to the lord with a covenant to allow him to shoot, such a covenant would be a burthen which would not run with the land; *Keppell v. Bailey* (a), 1 Smith's Lead. Ca. 38, *Ackroyd v. Smith* (b). In the Court below it was said, by *Martin*, B., "It is probable that such an exclusive right may by law exist, and be established by exclusive user," and *Wickham v. Hawker* (c) was referred to; but it is one thing to convey an exclusive right, and another to convey a concurrent right. There is no instance of an exclusive right in *alieno solo* being claimed by prescription. In *Clayton v. Corby* (d), Lord *Denman*, C. J., said, "It is observable that in all cases of a claim of right in *alieno solo*, whether immediately or in

(a) 2 Myl. & K. 517.

(b) 10 C. B. 164.

(c) 7 M. & W. 63.

(d) 5 Q. B. 419.

any degree resembling the present, such claim, in order to be valid, must be made with some limitation or restriction." No grant can give an exclusive right of shooting, so as to bind assignees. Trespass clausum fregit will not lie for breaking a free-warren, it should be trespass quare warrenum fregit; and a free fishery stands on the same footing; *Holford v. Bailey* (a). In *Dayrell v. Hoare* (b), where the donee of a power granted a lease of part of the land, with liberty to sport over the rest, *Littledale*, J., said, "The privilege is very peculiar; it is not known in the books, and a free warren seems to be quite different." The right of shooting cannot be claimed by user. No exclusive right can be so claimed; a claim to an easement may be established by user; but an easement is a right without profit. This is a claim to the whole profits of the land of a certain description. When a person has, for a number of years, done on the land of another some act which is *prima facie* tortious, the law presumes a grant; but here no such presumption can arise, for the lord being the owner of a cattlegate has a right to come on the land.—He then referred to the pleadings, and argued that the first and third counts set up inconsistent rights, so that the plaintiff could not have judgment on both; also that the third count alleged a right unknown to the law. On this point he cited *The Duke of Devonshire v. Lodge* (c).

Hugh Hill (*Unthank* with him), for the plaintiff.—The land is the soil and freehold of the plaintiff, and therefore he has the absolute right of shooting game upon it; and even if the soil is not in him he has such an exclusive right of shooting as will enable him to maintain this action. By the deed of conveyance the vendor "granted, bargained,

(a) 18 Q. B. 426.

(b) 12 A. & E. 356.

(c) 7 B. & C. 36.

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sold, aliened, released, surrendered and conveyed" to the defendant, his heirs and assigns, "all those four cattlegates, or beast grasses in, upon and over the close of pasture ground called Bretherdale Bank." And the admittance states that the defendant prayed to take of the lord of the manor "all those four cattlegates or beast grasses in a stinted pasture, called Bretherdale Bank." The question then is, what interest did the defendant take in those cattlegates? It is submitted that he did not take a freehold in the soil, but only a limited interest in the pasture or vesture of the land. In *Doe d. Reay v. Huntington* (*a*), Lord *Ellenborough*, C. J., says, "It seems to be now so far settled in Courts of law that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question. In the case of *Stephenson v. Hill* (*b*) Lord *Mansfield* and Mr. Justice *Dennison* considered it to be a settled point, that in the case of customary estates the freehold was in the lord. And in the very late case of *Burrell v. Dodd* (*c*) the Court of Common Pleas expressly held these customary tenant-right estates not to be freehold." In *Thompson v. Hardinge* (*d*), it was held that the freehold of customary tenements within a manor, though such tenements be not held at the will of the lord and are transferrable by lease and release and admittance, is in the lord. The terms here used will not necessarily pass the soil. In Co. Litt. 4 *b*, it is said, "If a man hath twenty acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass, because he hath a particular right in the land; for thereby he shall

(*a*) 4 East, 271, 289.(*b*) 3 Burr. 1278.(*c*) 3 Bos. & P. 378.(*d*) 1 C. B. 940.

not have the houses, timber-trees, mines, and other real things, parcel of the inheritance, but he shall have the vesture of the land, (that is) the corn; grass, underwood, sweepage, and the like, and he shall have an action of trespass, *quare clausum fregit.*" The same law is stated in Shep. Touch. 97. Also in Co. Litt. 47 *a*, it is said, "But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is manorable, and the lessor may distrain the cattle upon the land." Therefore looking to the form of the documents, they convey nothing more than a right to the vesture of the land, with a limited right of turbary if the owner of the cattlegate has a house within the manor. The tenants are compelled to come in and be admitted; if they do not, the lord has a right to seize the cattlegate quoique. There is no pretence for saying that the owners may plough up the pasture—it might with equal truth be argued that they could work the minerals—and if the land was ploughed up, what would become of the right of turbary? [Williams, J.—The persons entitled to it might maintain trespass.] *Regina v. Pratt* (*a*) is an authority to that effect. *Ackroyd v. Smith* (*b*) has no application to this case. *Benington v. Goodtitle* (*c*) and *Metcalf v. Roe* (*d*) are against the defendant's argument, for they shew that ejection will lie for a right of pasture, though it be not a right to the soil itself. *Rex v. Inhabitants of Whigley* (*e*) does not touch the present case. *Miller v. Jackson* (*f*) was a claim to a modus, which, consistently with certain ancient documents, could not have existed at the time of legal memory, and so the Court decreed an account of tithe in kind. *Rex v. Watson* (*g*)

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| (<i>a</i>) 4 E. & B. 860. | (<i>d</i>) Andrews, 107. |
| (<i>b</i>) 10 C. B. 164. | (<i>e</i>) 1 T. R. 137. |
| (<i>c</i>) Vin. Abr. tit. "Ejection"
(Q.), pl. 43, Andrews, 106. | (<i>f</i>) 1 Y. & J. 65.
(<i>g</i>) 5 East, 480. |

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was a question as to liability to poor rate; and *Rex v. Stoke* (a) was a settlement case. In *Passingham*, App., *Pitty*, Resp. (b), it was held that the tenure was freehold, because, by the custom of the manor, the land was conveyed by ordinary assurance and without license from the lord, or any enrolment, or surrender and admittance. *Bingham v. Woodgate* (c) was heard on appeal before Lord *Brougham*, C., who was inclined to come to a different conclusion from that of the Master of the Rolls. *Dayrell v. Hoare* (d) only decided that there was no valid execution of that particular power. *Clayton v. Corby* (e) proceeded on the ground that the claim was without limit, and therefore unreasonable. The statute 2 Jac. 1, c. 27, s. 2, mentions "grouse." The case finds that the lords of the manor have always killed grouse on Bretherdale Bank; and also that until the defendant killed the grouse, no cattlegate owner had done so except by stealth or permission of the lord; therefore the inference is, that when the original compact was made between the tenants and the lord, every right, except the right of pasturage and turbary, was left in the lord. The lord would have the right of shooting, as incident to the ownership of the soil, if it was not given to him by the bargain between the parties; but the fair inference to be drawn from the facts stated is that such was the original compact. It is submitted, therefore, that the plaintiff is owner of the soil, and that the defendant, as owner of cattlegates, has only a limited right to the pasture, which does not entitle him to kill grouse on the land in question.

*Grant*, in reply.—In *Regina v. The Lords of the Manor*

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| (a) 2 T. R. 451.      | (d) 12 A. & E. 356. |
| (b) 17 C. B. 299.     | (e) 5 Q. B. 419.    |
| (c) 1 Russ. & M. 750. |                     |

of *Ingleton* (*a*) the operative words of the deed were "grant, bargain, sell, alien, surrender, and convey," habendum to the alienee, his heirs and assigns for ever, "according to the custom of the manor, and under the rents, dues, duties and services used and accustomed;" and that was held not to be a copyhold estate. *Doe d. Reay v. Huntingdon* (*b*) was a case of tenant-right estate, which differs from a military tenure by knight service, escuage, or the like: *Fawcet v. Lowther* (*c*). There is no foundation for the argument as to a supposed contract; the feudal relation between lord and tenant did not originate in contract. All copyholders were originally villeins, with whom there could be no contract. The ancient notion of wild birds was that they were part of the soil. In the *Bishop of London's case* (*d*) the bishop granted to the defendant a lease of land for a term of years, excepting the trees and the herons and shovellers making their nests in the trees. During the lease the defendant took some of the herons, and an action of trespass quare clausum fregit having been brought against him by the bishop, it was adjudged that he recover the value of the herons, for although they were *fere naturae*, he had an interest in them by reason of the trees in which they built. Wild birds having been thus considered a part of the soil, the exclusive right to them could no more originate in prescription than the right to mines: *Wilkinson v. Proud* (*e*).

*Cur. adv. vult.*

The judgment of the Court was now delivered by

COLERIDGE J.—This was a proceeding in error on the

(*a*) 8 Dow. P. C. 693.

(*d*) 14 Hen. 8, f. 1.

(*b*) 4 East, 271.

(*e*) 11 M. & W. 33.

(*c*) 2 Ves. Sen. 300, 303.

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judgment of the Court of Exchequer upon a special case, which was stated in order to decide the right of pursuing and killing grouse, and other game, upon the land called Bretherdale Bank, in the county of Westmoreland.

The declaration contained three counts: the first, trespass for entering the plaintiff's close called Bretherdale Bank, and killing grouse and other game there; the second, trover for grouse of the plaintiff; the third, case for the disturbance of plaintiff's exclusive right of shooting grouse on Bretherdale Bank. To this declaration there were four pleas; first, not guilty to the whole declaration; secondly, to first count, that the land was not the land of the plaintiff; thirdly, to first count, that the land was defendant's soil and freehold: fourthly, to third count, a traverse of plaintiff's exclusive right as claimed. And issues were joined on all the pleas.

The questions stated for the opinion of the Court were.—First; whether the plaintiff could maintain the present action against the defendant for shooting at, killing, or carrying away grouse from Bretherdale Bank. Secondly, in what manner the verdict ought to be entered. The Court of Exchequer was equally divided in opinion upon the main question, and for the purpose of having the judgment of a Court of error, the verdict was entered for the plaintiff upon the issues on the pleas to the first and second counts, and for the defendant upon the issue on the plea to the third count.

It appears from the statement in the special case, that the plaintiff below is lord of the manor of Bretherdale, and that Bretherdale Bank is a track of inclosed pasture land containing about 508 acres, and has been from time immemorial within the manor, and has been usually called stinted pasture, and sometimes common pasture. It adjoins Bretherdale Waste or common, from which it is divided by

a fence. Bretherdale Bank has been immemorially subject to eighty customary rights, called cattlegates. And the defendant below is seized of four of these cattlegates, as customary estates of inheritance, the other cattlegates being vested in eighteen other persons as customary estates of inheritance.

Upon these facts, the principal question to be considered is the nature of the cattlegates held by the defendant below; because the right of sporting on any land where there is no grant of free warren is a right primarily incident to the ownership and possession of the soil. If the defendant below, as owner of the four cattlegates, was in possession of the soil of Bretherdale Bank, the plaintiff below, not having a grant of free warren, could not maintain trespass against him for sporting over it. If, on the other hand, the cattlegates gave no right to the possession of the soil, the lord of the manor, as owner of the soil, might well sustain such an action.

It is found by the special case that these cattlegates are held of the lord of the manor, "according to the custom of the manor, as customary estates of inheritance, by payment of fine and customary rents of small amount, and by and under dues, duties, suits, and services of right accustomed." The cattlegates also pass by customary deeds, followed by admittance at the next lord's Court, or out of Court by the steward of the manor; and a fine is payable on admittance. The lord is entitled to seize quoique for nonpayment of fines. From this statement it seems clear that these cattlegates are in the nature of copyhold tenements, and are held of the lord of the manor. It is further found by the special case that each cattlegate confers on the owner the right of depasturing on Bretherdale Bank one head of cattle from the 26th May till the 24th April; and of depasturing as many sheep

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as the cattlegate owner has, from the 10th October till the 24th April. Now from this statement, independently of any acts of ownership, we should infer that the cattlegate owner was not in possession of the soil, but that the ownership of the soil remained in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners. And the passages cited from Lord *Coke* in the course of the argument appear to us conclusive upon this point. He says (Co. Lit. 58 b) speaking of what things may be granted by copy of Court roll,—“secondly, underwood, without the soil, may be granted by copy to one and his heirs; and so may the herbage or vesture of land.” And in Co. Lit. 4 b, he says that “the grant of vesturam terræ, or herbagium terræ, does not pass the land or soil itself.” Is a cattlegate then a more extensive right than that of vestura terræ, or herbagium terræ? It seems to us certainly not. And the language of the conveyance upon which the admittance is made is strong to shew an exclusion of the soil itself. The words in the conveyance are, “All those four cattlegates, or beast grasses *in*, *upon*, and *over* the close of pasture ground called Bretherdale Bank;” clearly shewing that all that was conveyed was the feeding of beasts *in* and *upon* the close, but not the close itself.

But then it is said, the acts of ownership shew the nature of the right conferred by the grant, and prove that the owner of a cattlegate in possession is also in possession of the soil. We think however that no such inference can be drawn from any of those acts; as they are all acts done with a view solely to the better enjoyment of the right of pasture, and are in no way adverse to the right of the lord of the manor as owner of the soil. With respect to the change of the time of stint, it is said that that was done at a meeting of cattlegate owners. But whether the lord sanctioned it or not does not appear. The special case

only states that "there was no evidence that the lord of the manor had notice of the change." We cannot infer from that statement that in fact the cattlegate owners made the change in spite of the lord, or without his assent. It is equally consistent with the supposition that the lord was ignorant of the change, or if he knew of it, did not think it worth his while to interfere, in a matter of pure indifference to himself. The other acts, viz.:—the keeping up a fence against the common, and the employment of a frithman to prevent overstocking, are clearly acts ascribable entirely to their several rights of pasture upon Bretherdale Bank. On the other hand the plaintiff below and his predecessors have immemorially shot over Bretherdale Bank, and appointed gamekeepers, and authorized other persons to sport thereon. And this has been done without obstruction from the cattlegate owners or any of them, until the defendant below shot grouse thereon, the subject of the present action. And one instance is mentioned of a cattlegate owner asking, and obtaining leave, of the plaintiff below to sport on Bretherdale Bank. And further, since 1819, the lords of the manor, have always preserved the game on Bretherdale Bank, and prevented all persons unauthorized by them from sporting there. We think therefore that the acts of ownership on both sides are quite consistent with the supposition that the defendant below, as owner of cattlegates, had only a right to the feeding of his beasts upon the close, with no right to the soil itself; and that the plaintiff below, the lord of the manor, was in possession of the soil, and so had a right to maintain trespass against the defendant for sporting thereon. The grouse shot on the land of the plaintiff belonged to him, according to all the authorities, and so the second count is sustained. As regards the third count, in which the plaintiff below claims an exclusive right to

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shoot on Bretherdale Bank; we agree with Baron *Martin*, in his judgment in the Court below, that the facts stated do not warrant judgment in his favour.

For these reasons, we are of opinion that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

#### IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

Feb. 7.

BOYD v. HIND.

In an action for goods sold, to which the defendant pleaded an agreement between the defendant and the plaintiff and divers other creditors of the defendant

THIS was an appeal by the defendant against the decision of the Court of Exchequer in making absolute a rule obtained by the plaintiff to set aside the verdict for the defendant, on the ground that there was no evidence to support it, and enter a verdict for the plaintiff for 33*l.* 0*s.* 8*d.*

to accept a composition, it was proved that the defendant called a meeting of his creditors at which the plaintiff was present and a composition was proposed but not arranged. A witness, who was clerk to an accountant employed by the defendant, stated that he afterwards shewed the plaintiff a composition paper, which had already been signed by some of the creditors, and requested him to sign it also. This paper purported to be a memorandum by which each of the undersigned creditors in consideration of the agreement therein contained on the part of the others, agreed with the others, and also with the defendant, to accept a composition of 10*s.* in the pound, by approved bills, and on the receipt of such bills to execute a release. The witness further stated that after looking over the list of creditors, the plaintiff asked if *L.* had signed, and on being answered in the negative, he said he would not sign till *L.* had signed. The witness proceeded to state that he left the plaintiff with the understanding that he was to get *L.* to sign and then the plaintiff would sign. That the witness afterwards saw *L.* and explained the matter to him and procured him to sign the paper, and that he afterwards saw the plaintiff and claimed the performance of his promise to sign if *L.* had signed, but the plaintiff refused to do so.

*Held:* First, that there was no evidence for the jury that the plaintiff had induced *L.* to sign the composition paper on the faith that the plaintiff would afterwards sign it. Secondly, that even if the plaintiff had so induced *L.* to sign, that would not have constituted any answer in law to the action.

The declaration was for goods sold and delivered, and money due on accounts stated.

Pleas.—First: as to 66*l.* 1*s.* 4*d.* parcel of the money claimed. That after the contracting of the said debt and accruing of the causes of action, &c., the defendant being indebted to the plaintiff in the said sum, parcel, &c., and to divers other persons in divers large sums, and the defendant being in embarrassed and insolvent circumstances and unable to pay the plaintiff and his said other creditors their debts aforesaid in full, whereof the plaintiff and the said other creditors had notice, it was agreed between the defendant and the plaintiff and divers of the said other creditors of the defendant and the plaintiff, and the said divers of the said other creditors agreed with each other and with the defendant, that he should pay to them, and that they should accept a composition of 10*s.* in the pound on the amount of the debts owing to them respectively from the defendant, by three equal instalments at three, six, and nine months, in full satisfaction and discharge of the said debts, the said instalments to be secured by the acceptances of Messrs. Shores & Brill.—Averments: that the defendant has been always ready and willing to perform the said agreement on his part, and all things have happened and exist to entitle him and the said creditors, parties thereto, to a performance of the same by the plaintiff, and he was ready and willing to pay to the plaintiff a composition of 10*s.* in the pound on the amount of the said 66*l.* 1*s.* 4*d.*, parcel, &c., by the instalments aforesaid, and to secure the same by the acceptances of the said Messrs. Shores & Brill, according to the said agreement, but the plaintiff refused to accept or receive the same, and discharged the defendant from tendering or offering it or the said acceptances.—The plea concluded with payment into Court of 33*l.* 6*s.* 8*d.*

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Secondly to the residue of the money claimed: Never indebted.

Replications, joining issue on the first plea, except as to the said sum of 33*l. 0s. 8d.*, parcel, &c., and accepting that sum in satisfaction, &c.; and taking issue on the second plea.

The cause was tried before *Martin*, B., at the London sittings after Hilary Term, 1856, when the following evidence was adduced.—The case then set out the notes of the learned Judge, from which it appeared that the defendant who was a tradesman, had called a meeting of his creditors at which the plaintiff was present; and that after a statement of the defendant's affairs a composition was proposed, but not assented to. A witness named *Darby*, (clerk to an accountant who attended the meeting for various creditors and afterwards acted for defendant), deposed as follows:—“I told the plaintiff I was going round to the different creditors to get them to sign a composition paper (*a*) to accept 10*s.* in the pound. He looked over the list of creditors: half a dozen had signed. He asked if Mr. *Lunham* had signed. I said he had not. He said he would not sign until Mr. *Lunham* had signed.

(*a*) The composition paper was as follows:—“Memorandum.—The undersigned creditors of Andrew Hind of, &c., Do, and each of them Doth, in consideration of the agreement hereinafter contained on the part of the others of them, and so far as relates to the debt due or growing due to himself, or his partner or partners, or principal or principals, agree with the others of them and also with the said Andrew Hind, to accept a composition of 10*s.* in the pound in full satisfaction and

discharge of the respective debts owing or growing due to them respectively from the said Andrew Hind, secured by approved bills, payable by three equal instalments of three, six and nine months after the date hereof, upon condition that such bills be handed to the several creditors within fourteen days from the date hereof.”—(It was then provided that bills and securities already given should be delivered up.)—“And on the said delivery of such approved bills for the said

I left him with the understanding that I was to get Mr. Lunham to sign and then he would sign. I saw Mr. Lunham and explained the matter to him. I am not quite certain whether I stated what the plaintiff had said. He made an appointment for the next morning, and he then signed. I went back to the plaintiff in the course of a few days. I took the paper with me. I urged him to sign in compliance with his promise. He looked at the paper and said that not more than half the creditors had signed. He inquired whether Church and Stubbs had signed. I told him they had agreed to sign, but would not do so until the rest had signed or agreed to sign. I said there might be some difficulty in getting their signature. He said that if they signed he would; that if they agreed, he would do the same. I reminded him that he had said he would sign if Mr. Lunham signed. He still objected. I went to plaintiff after Church and Stubbs had signed: I reminded him of his promises. He was still unwilling."

The learned Judge told the jury that if they believed that the plaintiff had agreed, if Lunham would take 10s. in the pound, to do the same; and that such agreement justified a representation to Lunham to that effect; and that Lunham was induced to sign and did sign acting on the faith of that representation, then they were to find a verdict for the defendant; and his Lordship left it to the jury to say whether the plaintiff authorized the witness Darby to represent to Lunham as an inducement to sign, that he the plaintiff would sign if Lunham would sign. The

composition, the said creditors, for the consideration aforesaid, Do, and each of them Doth, for himself and his partner or partners, hereby agree to execute an effectual release from all debts, bills of exchange, due or growing

due, claims, and demands which they have on the said Andrew Hind or which he has given to them up to the day of the date hereof."

(Signed by Lunham and ten other creditors.)

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jury found a verdict for the defendant, and the learned Judge reserved leave to the plaintiff to move to enter a verdict for him for 33*L* 0*s.* 8*d.*, if the Court should be of opinion that there was no evidence to go to the jury: the plea to be amended, if necessary.

In Easter Term, 1856, a rule nisi was granted and made absolute.

The question for the opinion of the Court is, whether the said rule should not have been discharged.

*Knowles* argued for the defendant in last Michaelmas Vacation (*a*) (Nov. 28).—First, there was evidence to support the plea. It was proved that the plaintiff, by Darby his agent, had represented to Lunham that if he would sign the composition paper, the plaintiff would also sign it; and that Lunham was induced to sign the paper on the faith that the plaintiff would also agree to the composition. Secondly, these facts constitute a good answer in law to the action. *Good v. Cheesman* (*b*) established this principle, that where there is an agreement between a debtor and his creditors that the latter shall receive a composition, such agreement, though unexecuted, is binding, since it constitutes a new valid contract, the consideration for which to each creditor is the forbearance of the rest. In *Wood v. Roberts* (*c*) *Abbott*, C. J., ruled that where one creditor, by undertaking to discharge his debtor, has induced another creditor to accept a composition, the former cannot afterwards enforce his claim, since it would be a fraud on that creditor. In *Steinman v. Magnus* (*d*) the agreement for a composition was held binding on the creditor who sued, though it did not appear that he had actively induced any

(a) Before Cockburn, C. J.,  
Wightman, J., Williams, J., Crompton, J., Crowder, J., and Willes, J. (b) 2 B. & Adol. 328.  
(c) 2 Stark. 417.  
(d) 11 East, 390.

of the other creditors or the surety to sign it. In *Norman v. Thompson* (*a*), *Pollock*, C. B., said, "The first question is simply whether an agreement between less than the whole number of the body of the creditors, to accept a composition is binding upon those parties who enter into that agreement. I do not think that there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same." The same doctrine was recognised by Lord *Kenyon* in *Butler v. Rhodes* (*b*).

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Petersdorff, contrâ.—It is admitted that an agreement between the debtor and two or more of his creditors to accept a composition, is binding on those creditors who sign it; but it is of no effect if made between the debtor and a single creditor: it must be binding as amongst the creditors themselves. The allegation in the plea, that it was agreed between the defendant the plaintiff and other creditors of the defendant, is necessary to make the plea good, but it was not proved. The plea does not allege a conditional agreement and the performance of the condition, but an absolute agreement. Now the agreement on the face of it is to be binding only on the "undersigned" creditors. It was proved that the plaintiff said that he would *not* sign until Lunham had signed; but not that he used any words binding him to sign if Lunham would sign. The plaintiff never parted with his right to elect whether he would sign or not after Lunham had signed. This is not like the case where a creditor has not signed, but has concurred with a body of the other creditors in agreeing to accept the composition, on the faith of which the debtor and the other creditors have been induced to alter their position, as in *Butler v. Rhodes* (*b*). In *Good v.*

(*a*) 4 Exch. 755.(*b*) 1 Esp. 236.

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*Cheesman* (a) the plaintiff had actually signed the agreement. [Cockburn, C. J.—The proposition contended for by the defendant is that if A., a creditor, induces B., another creditor, to sign a composition agreement by saying that if B. signs he will sign,—if B. signs, A. will be bound by the terms of the agreement, though he afterwards refuses to sign. Crompton, J.—It would be strange to hold, that inducing another creditor to sign, would have that effect, because the debtor is not privy to the arrangement.] In *Wood v. Roberts* (b) the plaintiff had undertaken to discharge the defendant. That might be a binding agreement, though all the creditors were not parties to it and though the agreement was not put into writing, if it was complete in itself without writing: *Norman v. Thompson* (c). Here the agreement is only to be binding on the creditors who sign it: the plaintiff not having signed it is not a creditor whom it purports to bind.

*Knowles*, in reply.—The plaintiff having induced Lunham to sign the composition agreement by the representation

(a) 2 B. & Adol. 328.

(b) 2 Stark. 417.

(c) 4 Exch. 755. There is an error in the report of that case. The reporters have been favoured with the following corrections and note of Mr. Justice Willes: — “Page 755, marginal note, lines 21 and 22, dele ‘divers of;’ line 26, dele ‘last mentioned;’ page 756, line 7, dele ‘divers of;’ line 9, dele ‘last mentioned.’ The words struck out were not in the plea. An application was made to amend by adding them, and that application was refused. It was the want of them that raised the question.

Page 756, for Pollock, C. B., read Platt, B.; page 758, line 6 from bottom, after ‘divers’ read ‘other persons;’ line 8 from bottom, dele ‘divers of;’ page 759, line 7, dele ‘divers of;’ line 10, dele ‘wholly;’ page 760, line 3, dele ‘divers of;’ line 4, dele ‘last mentioned;’ line 7, dele ‘divers of;’ line 28, after ‘had been’ insert ‘precisely;’ line 30, for ‘very unlike’ read ‘not the same as.’ The only difference between this case and *Brown v. Dakyns* was that the plea used the words ‘the said,’ which by reference to ‘divers other persons’ might mean all the creditors or part.”

that he would do so also, and afterwards refused, it was a fraud on Lunham to allow the plaintiff to maintain an action; and he is therefore estopped from suing. [Cockburn, C. J.—If so, the plea should have been that the plaintiff induced Lunham to execute the agreement by such representation, and that therefore the plaintiff is estopped. This plea alleges that the plaintiff agreed to accept the composition, which is untrue.] In *Norman v. Thompson* (*a*) no agreement had been signed. When the plaintiff was reminded by Darby of his promise to sign if Lunham signed, by not contradicting it he admitted that he had made the promise.

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The judgment of the Court was now delivered by

WILLIAMS, J.—In this case we are of opinion that the judgment should be affirmed. We think the Barons were right in holding that there was no evidence to support the verdict for the defendant.

It was proved on his behalf that he had called a meeting of his creditors, at which the plaintiff was present, and a composition was proposed, but not arranged; and a witness, called Darby, who was clerk to an accountant employed by the defendant, swore that he afterwards shewed the plaintiff a composition paper, which had already been signed by some of the creditors, and requested him to sign it also. That paper purported to be a memorandum by which each of the *undersigned* creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others, and also with the defendant, to accept a composition of ten shillings in the pound by approved bills, and on the receipt of such bills to execute a release. Darby farther swore that, after

(*a*) 4 Exch. 755.

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looking over the list of creditors, the plaintiff asked if one of them, called Lunham, had signed, and on being answered in the negative, he said he would not sign till Lunham had signed. The witness proceed to state that he left the plaintiff with the understanding that he was to get Lunham to sign, and then he (the plaintiff) would sign; that the witness afterwards saw Lunham and explained the matter to him (though the witness was not quite certain whether he stated what the plaintiff had said), and procured him to sign the paper, and that he afterwards saw the plaintiffs and claimed the performance of his promise to sign if Lunham had signed, but that the plaintiff refused to do so, and persisted in his refusal in spite of all remonstrance.

On these facts it was contended for the defendant, that there was evidence for the jury to prove that the plaintiff had represented to Lunham that if he would sign the paper he (the plaintiff) would also afterwards sign it, and that thus he had induced Lunham to sign, on the faith that he (the plaintiff) would also agree to the composition; and it was further contended that this constituted a legal answer to the action.

But we are of opinion that this defence is unfounded, both in fact and in law.

It appears to us that there is no evidence whatever that the plaintiff authorized Darby as his agent to make any representation to Lunham as suggested. The proof goes no further than to shew that the plaintiff promised Darby, as the agent of the defendant, that he (the plaintiff) would sign in the event of Lunham having signed.

But even if there were evidence of such authority, so that the plaintiff could be properly said to have induced Lunham to sign, we think that this would not support either the plea actually pleaded, or any other valid plea which

(pursuant to the leave given to amend) could be put on the record.

The law with respect to defences founded on compositions between a debtor and his creditors appears not to have been distinctly defined until the case of *Good v. Cheesman* (a). It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by accord and satisfaction. But since the decision of that case, the law has been regarded as settled, that a composition agreement, by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration to each creditor, viz., the undertaking of the other compounding creditors to give up a part of their claim. But no such agreement can operate as a defence, if made merely between the debtor and a single creditor; the other creditors, or some of them, must also join in the agreement with the debtor and with each other, for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater, which would be invalid by reason of want of consideration for relinquishing the residue. And in accordance with this doctrine the plea put on the record in the present case was framed. It is plain, however, that it has failed in proof, for no other agreement by way of composition was entered into by Lunham, or any other creditor, than that which was reduced into writing by the composition paper, and which certainly was not any agreement with the plaintiff, because it is expressly confined to those who shall have signed it.

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(a) 2 B. & Ald. 328.

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It was, however, urged on the part of the defendant, that there was evidence of a promise by the plaintiff to sign the composition paper if Lunham would sign it; and although it was not argued that such a promise could be pleaded as equivalent to an actual composition, yet it was contended that as by such promise Lunham had been induced to compound, the plaintiff was estopped from bringing his action, and in support of this argument *Wood v. Roberts* (a) was mainly relied on. In that case two creditors of the defendant had agreed to accept a sum by way of composition, on the express condition on the part of the plaintiff, that he, taking for himself the rest of the defendant's property, of which he had possessed himself, would also discharge the defendant. And *Abbott*, C. J., ruled, that if the plaintiff, by undertaking to discharge the defendant, had induced any other creditor to enter into a composition, he could not afterwards enforce his claim, since it would be a fraud on that creditor. But it appears to us that, in substance, the learned Judge only ruled (in accordance with the doctrine established some years afterwards in *Good v. Cheesman*) that the agreement by the plaintiff to accept the composition was rendered binding on him by reason of the good consideration arising out of the agreement of the other creditors, also to accept it, and that if it were held otherwise it would be a fraud on them.

In the case of *Butler v. Rhodes* (b), which was also cited on the part of the defendant, the creditor who brought the action had not only induced the other creditors to execute a composition deed, but had also induced the debtor to assign all his property to a trustee for the benefit of his creditors; and Lord *Kenyon* is reported to have ruled that the plaintiff, who had refused to execute the deed, could not be allowed to recede from what he had done, and bring

(a) 2 Stark. 417.

(b) 1 Esp. 236.

an action for his debt. The learned Judge appears to have relied chiefly on the circumstance that in consequence of the act of the plaintiff the defendant had been led to part with all his property. In the present case the defendant was not induced to alter his position in any way by the promise of the plaintiff to sign the composition paper. The two cases may thus be distinguished. And it is not necessary to consider whether the ruling of Lord *Kenyon* is reconcileable with the principles established by the later authorities.

For these reasons we are of opinion that, though the plaintiff may have rendered himself liable to an action on the breach of a promise to sign the composition paper, he has done nothing which can be pleaded as a defence to the present action.

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Judgment affirmed.

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Secondly to the residue of the money claimed: Never indebted.

Replications, joining issue on the first plea, except as to the said sum of 33*l*. 0*s*. 8*d*., parcel, &c., and accepting that sum in satisfaction, &c.; and taking issue on the second plea.

The cause was tried before *Martin*, B., at the London sittings after Hilary Term, 1856, when the following evidence was adduced.—The case then set out the notes of the learned Judge, from which it appeared that the defendant who was a tradesman, had called a meeting of his creditors at which the plaintiff was present; and that after a statement of the defendant's affairs a composition was proposed, but not assented to. A witness named Darby, (clerk to an accountant who attended the meeting for various creditors and afterwards acted for defendant), deposed as follows:—“I told the plaintiff I was going round to the different creditors to get them to sign a composition paper (*a*) to accept 10*s*. in the pound. He looked over the list of creditors: half a dozen had signed. He asked if Mr. Lunham had signed. I said he had not. He said he would not sign until Mr. Lunham had signed.

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composition, the said creditors, for the consideration aforesaid, Do, and each of them Doth, for himself and his partner or partners, hereby agree to execute an effectual release from all debts, bills of exchange, due or growing

due, claims, and demands which they have on the said Andrew Hind or which he has given to them up to the day of the date hereof."

(Signed by Lunham and ten other creditors.)

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| (a) Before <i>Cochburn</i> , C. J.,
<i>Wightman</i> , J., <i>Williams</i> , J., <i>Crompton</i> , J., <i>Crowder</i> , J., and <i>Willes</i> , J. | (b) 2 B. & Adol. 328.
(c) 2 Stark. 417.
(d) 11 East, 390. |
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of the other creditors or the surety to sign it. In *Norman v. Thompson* (a), Pollock, C. B., said, "The first question is simply whether an agreement between less than the whole number of the body of the creditors, to accept a composition is binding upon those parties who enter into that agreement. I do not think that there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same." The same doctrine was recognised by Lord Kenyon in *Butler v. Rhodes* (b).

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Petersdorff, contrâ.—It is admitted that an agreement between the debtor and two or more of his creditors to accept a composition, is binding on those creditors who sign it; but it is of no effect if made between the debtor and a single creditor: it must be binding as amongst the creditors themselves. The allegation in the plea, that it was agreed between the defendant the plaintiff and other creditors of the defendant, is necessary to make the plea good, but it was not proved. The plea does not allege a conditional agreement and the performance of the condition, but an absolute agreement. Now the agreement on the face of it is to be binding only on the "undersigned" creditors. It was proved that the plaintiff said that he would *not* sign until Lunham had signed; but not that he used any words binding him to sign if Lunham would sign. The plaintiff never parted with his right to elect whether he would sign or not after Lunham had signed. This is not like the case where a creditor has not signed, but has concurred with a body of the other creditors in agreeing to accept the composition, on the faith of which the debtor and the other creditors have been induced to alter their position, as in *Butler v. Rhodes* (b). In *Good v.*

(a) 4 Exch. 755.

(b) 1 Esp. 236.

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Secondly to the residue of the money claimed: Never indebted.

Replications, joining issue on the first plea, except as to the said sum of 33*l.* 0*s.* 8*d.*, parcel, &c., and accepting that sum in satisfaction, &c.; and taking issue on the second plea.

The cause was tried before *Martin*, B., at the London sittings after Hilary Term, 1856, when the following evidence was adduced.—The case then set out the notes of the learned Judge, from which it appeared that the defendant who was a tradesman, had called a meeting of his creditors at which the plaintiff was present; and that after a statement of the defendant's affairs a composition was proposed, but not assented to. A witness named Darby, (clerk to an accountant who attended the meeting for various creditors and afterwards acted for defendant), deposed as follows:—"I told the plaintiff I was going round to the different creditors to get them to sign a composition paper (*a*) to accept 10*s.* in the pound. He looked over the list of creditors: half a dozen had signed. He asked if Mr. Lunham had signed. I said he had not. He said he would not sign until Mr. Lunham had signed.

(*a*) The composition paper was as follows:—"Memorandum.—The undersigned creditors of Andrew Hind of, &c., Do, and each of them Doth, in consideration of the agreement hereinafter contained on the part of the others of them, and so far as relates to the debt due or growing due to himself, or his partner or partners, or principal or principals, agree with the others of them and also with the said Andrew Hind, to accept a composition of 10*s.* in the pound in full satisfaction and discharge of the respective debts owing or growing due to them respectively from the said Andrew Hind, secured by approved bills, payable by three equal instalments of three, six and nine months after the date hereof, upon condition that such bills be handed to the several creditors within fourteen days from the date hereof."—(It was then provided that bills and securities already given should be delivered up.)—"And on the said delivery of such approved bills for the said

I left him with the understanding that I was to get Mr. Lunham to sign and then he would sign. I saw Mr. Lunham and explained the matter to him. I am not quite certain whether I stated what the plaintiff had said. He made an appointment for the next morning, and he then signed. I went back to the plaintiff in the course of a few days. I took the paper with me. I urged him to sign in compliance with his promise. He looked at the paper and said that not more than half the creditors had signed. He inquired whether Church and Stubbs had signed. I told him they had agreed to sign, but would not do so until the rest had signed or agreed to sign. I said there might be some difficulty in getting their signature. He said that if they signed he would ; that if they agreed, he would do the same. I reminded him that he had said he would sign if Mr. Lunham signed. He still objected. I went to plaintiff after Church and Stubbs had signed : I reminded him of his promises. He was still unwilling."

The learned Judge told the jury that if they believed that the plaintiff had agreed, if Lunham would take 10s. in the pound, to do the same ; and that such agreement justified a representation to Lunham to that effect ; and that Lunham was induced to sign and did sign acting on the faith of that representation, then they were to find a verdict for the defendant ; and his Lordship left it to the jury to say whether the plaintiff authorized the witness Darby to represent to Lunham as an inducement to sign, that he the plaintiff would sign if Lunham would sign. The

composition, the said creditors, for the consideration aforesaid, Do, and each of them Doth, for himself and his partner or partners, hereby agree to execute an effectual release from all debts, bills of exchange, due or growing due, claims, and demands which they have on the said Andrew Hind or which he has given to them up to the day of the date hereof."

(Signed by Lunham and ten other creditors.)

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jury found a verdict for the defendant, and the learned Judge reserved leave to the plaintiff to move to enter a verdict for him for 33*l. 0s. 8d.*, if the Court should be of opinion that there was no evidence to go to the jury: the plea to be amended, if necessary.

In Easter Term, 1856, a rule nisi was granted and made absolute.

The question for the opinion of the Court is, whether the said rule should not have been discharged.

Knowles argued for the defendant in last Michaelmas Vacation (*a*) (Nov. 28).—First, there was evidence to support the plea. It was proved that the plaintiff, by Darby his agent, had represented to Lunham that if he would sign the composition paper, the plaintiff would also sign it; and that Lunham was induced to sign the paper on the faith that the plaintiff would also agree to the composition. Secondly, these facts constitute a good answer in law to the action. *Good v. Cheesman* (*b*) established this principle, that where there is an agreement between a debtor and his creditors that the latter shall receive a composition, such agreement, though unexecuted, is binding, since it constitutes a new valid contract, the consideration for which to each creditor is the forbearance of the rest. In *Wood v. Roberts* (*c*) *Abbott*, C. J., ruled that where one creditor, by undertaking to discharge his debtor, has induced another creditor to accept a composition, the former cannot afterwards enforce his claim, since it would be a fraud on that creditor. In *Steinman v. Magnus* (*d*) the agreement for a composition was held binding on the creditor who sued, though it did not appear that he had actively induced any

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| <i>(a) Before Cockburn, C. J., Wightman, J., Williams, J., Crompton, J., Crowder, J., and Willes, J.</i> | <i>(b) 2 B. & Adol. 328.
 (c) 2 Stark. 417.
 (d) 11 East, 390.</i> |
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of the other creditors or the surety to sign it. In *Norman v. Thompson* (*a*), *Pollock*, C. B., said, "The first question is simply whether an agreement between less than the whole number of the body of the creditors, to accept a composition is binding upon those parties who enter into that agreement. I do not think that there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same." The same doctrine was recognised by Lord *Kenyon* in *Butler v. Rhodes* (*b*).

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(*a*) 4 Exch. 755.(*b*) 1 Esp. 236.

indenture, which provided, "that the defendants might take and use, whenever they should consider it necessary or expedient for maintaining the navigation of the canal below the seventh lock, so much of the water of the canal as they should consider necessary or expedient for that purpose, subject to a weekly rent of 10*l.* for each and any week or part of a week in which the water above the seventh lock should be taken or used by the defendants for the purposes above mentioned."—

On two occasions boats, having passed through the seventh lock, sunk; in order to raise them, the defendants emptied the lock, and the part of the canal immediately below the seventh lock; and then, having emptied the boats, refilled the canal between the sixth and seventh locks, by opening the sluices and letting in water from above. On another occasion the water having been let out of the canal between the seventh and sixth locks, for the purposes of enabling the defendants to get at the sixth lock to repair it, the defendants afterwards refilled that part of the canal by letting water down from above the seventh lock.

*Held*, that using the water for such occasional purposes was not taking or using water for the purpose of "maintaining the navigation of the canal" below the seventh lock: per *Alderson*, B., and *Bramwell*, B. (*Martin*, B., dissentiente). *Llewellyn and Others v. The Company of Proprietors of the Swansea Canal Navigation*, 348

#### CAPIAS AD SATISFACIENDUM.

*See PRACTICE*, (7).

#### CARRIER.

*See RAILWAY COMPANY*, (2), (3), (4).

#### CHARTER-PARTY.

##### CATTLEGATE.

*See GAME.*

##### CERTIORARI.

*See JUSTICE OF THE PEACE.*

#### CHARTER-PARTY.

*See SHIP*, (1).

##### (1). *Annexation of Custom.*

A declaration stated that by charter-party, it was agreed between the defendant, the owner of a ship called the "Maggie," being in the London Docks, and the defendants, that the ship should load a certain cargo, and therewith proceed to Hong Kong and deliver the same on being paid freight: "the ship to be consigned to the charterer's agents in China free of commission on this charter."

—Averments: That according to the custom of merchants in London, whenever a ship chartered in London for China is agreed to be consigned to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents as the consignees of the ship, to procure a charter or cargo for the ship for any voyage from such port; and they are entitled to be paid the usual broker's commission on the amount of freight payable under such charter, unless excluded by special contract: but in case the owners of the ship procure a charter or cargo for the ship for a voyage from such port without any default of the consignees, the consignees are entitled to the broker's commission on any freight payable under such charter-party, unless such

right is excluded by special contract.—*Breach*: That although the ship was loaded and arrived in China, and the plaintiffs' agents, as consignees, performed their duty free of commission on the outward voyage and cargo, and were ready to procure a charter or cargo from Hong Kong; and although the plaintiffs performed all conditions precedent, the defendants would not permit the plaintiffs' agents to procure a charter or cargo for any voyage from Hong Kong; and the defendant, without any default of the plaintiffs' agents, procured a cargo to the United Kingdom, the usual broker's commission on which amounted to a large sum, yet the defendant has not paid or allowed the same to the plaintiffs or their agents, whereby the plaintiffs were obliged to pay their agents a compensation in respect thereof.

On demurrer: *Held*, that the declaration was bad, since the custom did not explain or annex an incident to the contract, but added a new term to it. Also, per *Bramwell*, B., that the breach was wrongly assigned; for, assuming that the custom could be annexed to the contract as a usual term, the breach should have been that the defendant did not consign the ship to the plaintiffs' agents on the usual terms. *Phillipps and Others v. Briard*, 21

#### (2). Condition Precedent.

The stipulations in a charter-party that the vessel, being tight, staunch and strong, shall sail with all convenient speed, are not conditions precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated. *Torrbocchia v. Hickie*, 183

#### (3). Condition precedent—Alteration.

The defendant, a merchant at

Liverpool, and the plaintiff entered into a charter-party in the following terms: — “It is mutually agreed between the plaintiff the owner of the good ship ‘Zwaan’ now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, of the one part, and the defendant, the charterer, of the other part: that the said ship being tight, staunch and strong, shall with all convenient speed be made ready,” &c., as in the usual printed form of charter-party. The exception was as follows:—“Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, throughout this charter-party always excepted.” After the signing of the charter, the broker, who had acted for the plaintiff, wrote in the margin, to come after the words, “March next,” “wind and weather permitting with cargo or in ballast for ship's benefit.” He then took the charter to the defendant and told him that he had made the note in the margin which he said did not affect it. The defendant said that the note altered the matter and he did not know that he would then accept the charter, and he ultimately refused to do so. The ship did not sail from Amsterdam in consequence of what was admitted to be “the act of God.”—*Held*: First, that notwithstanding the words “throughout this charter-party,” the sailing of the ship from Amsterdam on the 15th March was a condition precedent to the obligation of the defendant to take and load the ship. Secondly, that the charter-party was avoided by the alteration so made in the margin.

To a declaration on the above charter-party alleging, as a breach, that the defendant made default in loading the agreed cargo and wholly

refused to load the ship or otherwise perform the contract, and wholly repudiated the said charter-party, the defendants pleaded setting out the charter-party, by which it appeared that it was warranted that the vessel should sail from Amsterdam to Liverpool on the 15th of March, and alleged that the vessel did not sail from Amsterdam on or before the 15th of March. The plaintiff replied to this plea that before the time of the sailing of the ship from Amsterdam, the defendant refused and declined to load the ship or otherwise perform the charter-party. *Held*, on demurrer, that the replication was bad. *Crookewit v. Fletcher and Another*, 893

(4). *Meaning of term "Dispatched."*

The plaintiff and defendant agreed by charter-party that the plaintiff's vessel should sail to Sydney and Moreton Bay, and thence proceed to Callao, Peru, where the captain should report his arrival to Messrs. G., who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed; and after completing her loading, proceed to any safe port in the United Kingdom: freight to be paid at the rate of 4*l.* sterling per ton weight of guano. "The owners guarantee that for the freight of 4*l.* per ton, the ship shall be dispatched from Australia within 21 days after arrival; if detained over 21 days &c. 3*l.* 10*s.* per ton to be the rate of freight. If ordered from Sydney to Moreton Bay the time so occupied not to be reckoned in the days as above." The vessel sailed from Liverpool on the 5th July, 1853, and anchored inside Sydney Heads on the 25th October, 1853. She was ordered to Moreton Bay, but bad weather and the insubordination of a portion of the crew

prevented the vessel from leaving Sydney Harbour until the 4th November, when she proceeded on her voyage, and on the 12th anchored inside the Flanders Rocks and outside Moreton Bay. She was taken in charge of a pilot up the channel and on the 14th arrived at her anchorage where she remained until the 5th December. Some of the crew having deserted and others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, and no addition to the crew could be procured at Moreton Bay. On the 5th December the master caused the anchor to be got up and the sails set by the men who were willing to work, with the assistance of the harbour master and pilot's crew, and the vessel proceeded on her voyage to Callao, but shortly afterwards stopped from the wind failing. During the night several of the seamen deserted. On the 6th the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, and they compelled the captain to return to Sydney. The vessel arrived at Sydney on the 12th December and remained there until the 6th January, 1854, when she sailed to Callao, where she ultimately arrived and brought home a cargo of guano.—*Held*, that under the above circumstances, the ship was not *dispatched* from Australia within twenty-one days after her arrival, and consequently that the plaintiff was not entitled to the freight of 4*l.* per ton. *Sharp v. Gibbs*, 801

(5). *Obligation to procure Pass to Load.*

Declaration on a charter-party, whereby it was agreed between the plaintiffs, owners of a vessel called the "Brevet," and the defendants,

that the vessel should sail to Melbourne and thence proceed to the port of Callao, Peru, where the captain should report his arrival to Messrs. G. & Co.: that the vessel being then tight, staunch, strong, and well conditioned for the voyage, Messrs. G. & Co. should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which should be given to the captain by the charterers' agents, free of expense within twenty-four hours of his application.—*Breach*: that the defendants made default in providing the agreed guano, and only provided an insufficient and less quantity.—*Plea*: that the port of Callao and the Chincha Islands are a part of the Republic of Peru, and that by the laws of that Republic every vessel proceeding from Callao to the Chincha Islands, for the purpose of taking on board a cargo of guano, is obliged to procure from the said government a written pass to do so, and the said vessel could not lawfully have proceeded from Callao to the Chincha Islands without such pass: that the vessel was, after her arrival at Callao, surveyed by officers of the said government, and the said government did, upon the report of the said surveyors, refuse to give such pass, or to allow the vessel to proceed to the Chincha Islands: and thereupon certain reparations were done to the vessel by the plaintiffs at Callao, and the said government did afterwards give a written pass for the vessel to proceed to the said Island, to take in a cargo of guano, but upon the condition expressed in the pass that more guano should not be placed on board than would make the vessel draw eighteen and a half feet of water: that the vessel did, by virtue

of such pass proceed to the Chincha Islands, and the defendants caused to be loaded on board her sufficient guano to make her draw eighteen and a half feet of water, and they could not without violating the laws of the said Republic have loaded a greater quantity, and if they had done so the vessel and cargo would have been liable to seizure by the said government.—*Held*, on demurrer, that the plea was bad, since the obligation was on the defendants to procure the proper pass, and it was not alleged that they were prevented from so doing by reason of the vessel not being well conditioned. *Kirk and Others v. Gibbs and Others*, 810

## COMMISSIONER.

*Under 7 & 8 Geo. 4, c. lxxvii.*

By 7 & 8 Geo. 4, c. lxxvii., s. 2, no person shall be capable of acting as a commissioner in the execution of that Act, who shall be interested in any contract for furnishing, supplying or selling any article, matter or thing to be employed or made use of for the purposes of the Act.

*Held*, that a person who had contracted with former commissioners to sell a plot of land to be used for the purposes of the Act was not disqualified from acting though the conveyance had not been executed. *Woolley v. Kay*, 307

## COMMON LAW PROCEDURE ACT, 1852.

*See COSTS, (2).*

*PLEADING, II. (1).*

*PRACTICE, (1), (3).*

*Proceeding against British Subject out of Jurisdiction.*

In November, 1852, the plaintiff's

attorney issued against the defendant a writ of summons in the form prescribed by the 18th section of the Common Law Procedure Act, 1852, for service on a British subject residing out of the jurisdiction. In the following March the defendant's attorney entered an appearance. The plaintiff's attorney not being aware that an appearance was entered, from time to time renewed the writ, and on the 31st March served the defendant, who had always resided in England, with a copy of the renewed writ.

*Held*, that there was no ground for setting aside the proceedings.  
*Green v. Braddyll*, 69

A British subject residing out of the jurisdiction, having been served with a writ of summons, under the 18th section of the Common Law Procedure Act, 1852, and not having appeared, a Judge's order was made that the plaintiff should be at liberty to proceed. Judgment was signed on the 28th of November. The defendant on the 12th March, applied to set aside the proceedings on the ground that the cause of action did not arise within the jurisdiction of the Court. *Held*, that the Judge's order was not void, and the defendant not having come within a reasonable time, the rule was refused. *Hutton v. Whitehouse*, 32

#### (2). *Abolition of Writs of Error.*

The provisions in the Common Law Procedure Act, 1852, relating to the abolition of writs of error do not apply to judgments of outlawry in civil suits. *Arding and Another v. Holmer*, 85

### COMMON LAW PROCEDURE ACT, 1854.

*See BILL OF EXCHANGE, (4).  
VENDOR AND VENDEE.*

#### (1). *Equitable Plea.*

On a motion for a rule to shew cause why an equitable plea should not be allowed, the Court directed that an option should be given to the plaintiff of having the issue tried by the Court.

In an action upon a covenant binding the defendant not to practise in S., the Court allowed an equitable plea that as between the defendant and the plaintiff the part of S., in which the defendant practised, had always been treated as being in S. M., and that it was not intended by the parties to restrain the defendant from practising in the part of S. in question; and that the covenant, as set forth in the declaration, was so framed by mistake.  
*Luce v. Izod*, 245

To a declaration for freight and portage for the conveyance of goods, the defendants pleaded by way of equitable defence as to 47l. 0s. 6d., parcel, &c., that the plaintiff's claim was for work done by him as a lighterman: that in the course of such employment the plaintiff agreed to convey on a certain river a quantity of coal of the defendants: that the coal was utterly lost through the negligence and improper conduct of the plaintiff, and that the cost price of the coal so lost was 47l. 0s. 6d., which the defendants claim equitably to set off against the sum pleaded to, and say that the said sums are equal in amount.

*Held*, that the subject-matter of the plea could not be pleaded by way of equitable defence, but merely afforded ground for a cross action.  
*Stimson v. Hall and Another*, 831

#### (2). *Equitable Replication.*

To a plea of the Statute of Limitations, in an action of trespass or

trespass on the case, the plaintiff will not be allowed to reply as an equitable answer, under s. 85 of the Common Law Procedure Act, 1854, that the trespasses, &c., were underground, and had been fraudulently concealed from the plaintiff till within six years before suit. *Hunter v. Gibbons*, 459

Declaration against executors, for goods sold, work done and money lent by the plaintiff to their testator. Pleas.—First the Statute of Limitations. Secondly, a set-off of money due from the plaintiff to the testator for the use and occupation of premises, money lent, money paid, &c. —Replication on equitable grounds to first plea: that the testator bequeathed his real and personal estate to the defendants upon trust, to pay his funeral and testamentary expenses, and debts and legacies, to hold the residue in trust for the plaintiff and his other children in equal shares.—Replication on equitable grounds to second plea: that the testator bequeathed to the plaintiff and his other children certain sums of money, and declared by his will, that the monies and other effects then already advanced and delivered by him to his children were, and should be deemed, advancements; and that they should not be required to account for the same. Averment.—That the alleged causes of set-off were money and effects then already advanced and delivered by the testator to the plaintiff.

*Held*, on demurrer, that the replications were bad. *Gulliver v. William Gulliver and Others, Executors of Thomas Gulliver, deceased*, 174

Declaration on the statute 4 Anne, c. 16, s. 27, by one tenant in common against another for not accounting for rent received by him. Plea:—

That before the receipt of the rents, the plaintiff and defendant, by indenture, demised the premises to W. for a term of 500 years, which by divers meane assignments vested in the defendant. Equitable replication:—That the indenture was a mortgage to secure a sum of money and interest; that the defendant received more than sufficient to pay the mortgage debt, interest and costs, and he accordingly paid the same.

*Held*, that the Court could not deal with the replication, since they had no power to compel a reconveyance; therefore they ordered it to be struck out. *Gorley v. Gorley*, 144

(8). *Amendment by Judge at Nisi Prius.*

Though by the Common Law Procedure Act, 1854, s. 96, a Judge on the trial is bound to make such amendments as are necessary for determining the real question between the parties, and the Court has power to review his decision in refusing an amendment, if injustice has been done by such refusal, yet the Court in general will not interfere to control the exercise of the Judge's discretion.

*Sembles*, that the proper course is for the party aggrieved by the Judge's refusal to amend, to make an application to the Court for leave to amend.

An action having been brought on a contract to convey smuggled goods to New York, the Judge at the trial refused an amendment, saying he would not assist the plaintiff to enforce a contract to defraud a foreign government. The plaintiff was nonsuited. A rule to set aside the nonsuit or for a new trial, on the ground that the Judge ought to have allowed the amendment, was discharged. *Brennan v. Howard*, 138

Libel. The declaration stated that the defendant wrote and published of the plaintiff that "a receipt was obtained from the defendant by fraudulent means, and that the plaintiff was cognizant of such fraud." The Judge at the trial allowed the declaration to be amended by introducing the letter, alleged to contain the libel, with the words "meaning thereby" immediately before the libel charged in the declaration.

*Held*, that the amendment was properly made. *Saunders v. Bate*, 402

(4). *Discovery of Documents.*

The Court will not, under the 50th section of the Common Law Procedure Act, 1854, order a defendant "to answer on affidavit what documents he has in his possession or power relating to the matters in dispute, and whether he objects, and on what grounds, to the production of such as are in his possession," where the defendant has furnished the plaintiff with an abstract of an account, and informed him that it was taken from a particular book which contained all the entries relating to the matters in dispute between them.

Per *Bramwell*, B., it is necessary in order to obtain a rule under this section, that the applicant should shew the existence of the document, the production of which is sought for. *Henry Bray, Administrator of James Bray, v. Finch*, 468

(5). *Garnishment.*

The general lien of an attorney on a judgment, for costs due from his client, does not prevail over an attachment under the garnishee clauses of the Common Law Procedure Act, 1854. *Hough v. Edwards*, 171

A. sold goods to B., to be paid for by bills of exchange at certain future periods. Before the bills were due C. recovered a judgment against A., and obtained a Judge's order under the 61st section of the Common Law Procedure Act, 1854, for attachment of the debt due from B. to A., and to shew cause why B. should not pay C. the debt due from B. to A. Upon this order being served on B., he gave C. a promissory note payable by instalments for the amount of the debt due to A. No further proceedings were taken under the attachment. A. afterwards became bankrupt.—*Held*, that the debt due from B. to A. was not discharged by the promissory note given by B. to C., and consequently that A.'s assignees were entitled to recover it from B.

*Semble*, that payment by the garnishee to the judgment creditor upon notice of the attachment, is no discharge of the debt due from the garnishee to the judgment debtor, but there must be a Judge's order for payment. *Turner and Another, Assignees of R. Griffith a Bankrupt, v. Thomas Jones*, 878

COMMITMENT.

*See GAMING.  
VAGRANT ACT.*

COMPANIES' CLAUSES CONSOLIDATION ACT, 1845,  
(8 & 9 VICT. c. 16).

*See JOINT STOCK COMPANY.*

*Remuneration of Secretary of Company.*

Under the 91st section of the "Companies' Clauses Consolidation Act, 1845," the determination as to the remuneration of the secretary of a Company is to be exercised only

at a general meeting. But it is no answer to an action by a secretary for his salary that no determination as to such salary had ever been exercised at any general meeting of the Company. *Bill v. The Darenth Valley Railway Company,* 305

## COMPOSITION.

*See BILL OF EXCHANGE (3).*

*Agreement between Creditors and their Debtor.*

In an action for goods sold, to which the defendant pleaded an agreement between the defendant and the plaintiff and divers other creditors of the defendant to accept a composition, it was proved that the defendant called a meeting of his creditors at which the plaintiff was present and a composition was proposed but not arranged. A witness, who was clerk to an accountant employed by the defendant, stated that he afterwards shewed the plaintiff a composition paper, which had already been signed by some of the creditors, and requested him to sign it also. This paper purported to be a memorandum by which each of the undersigned creditors in consideration of the agreement therein contained on the part of the others, agreed with the others and also with the defendant, to accept a composition of 10s. in the pound, by approved bills, and on the receipt of such bills to execute a release. The witness further stated that after looking over the list of creditors, the plaintiff asked if L. had signed, and on being answered in the negative, he said he would not sign till L. had signed. The witness proceeded to state that he left the plaintiff with the understanding that he was to get L. to sign and then the plaintiff would sign. That the

witness afterwards saw L. and explained the matter to him and procured him to sign the paper, and that he afterwards saw the plaintiff and claimed the performance of his promise to sign if L. had signed, but the plaintiff refused to do so.

*Held:* In the Exchequer Chamber, first, that there was no evidence for the jury that the plaintiff had induced L. to sign the composition paper on the faith that the plaintiff would afterwards sign it. Secondly, that even if the plaintiff had so induced L. to sign, that would not have constituted any answer in law to the action. *Boyd v. Hind,* 938

## CONCURRENT JURISDICTION.

*See COUNTY COURT, (2).*

## CONDITION.

*See CONTRACT, (2).*

*LANDLORD AND TENANT, (1), (2).*  
*RAILWAY COMPANY.*

## CONDITION PRECEDENT.

*See CHARTER-PARTY, (2), (3).*

## CONTRACT.

*See COMMISSIONER.*  
*RAILWAY COMPANY, (4).*

(1). *Salary at a certain Rate per Month.*

The defendant having contracted with the Lords of the Admiralty to provide a steam-vessel for exploring the river Niger, wrote to the plaintiff as follows:—"I am willing to give you the command of the steamer destined for an exploring and trading voyage up the river Niger and its tributaries. Your pay to be at

*the rate* of 50*l.* per month, commencing from the 1st December, 1853, and a commission of 20 per cent. on the net proceeds of the produce you may bring down." In reply, the plaintiff wrote to the defendant as follows:—"In answer to your letter of yesterday offering me the command of the vessel to go out in a trading and exploring voyage to the river Niger and its tributaries *at a fixed pay* of 50*l.* per month and 20 per cent. on the net proceeds of the goods obtained, I beg leave to say that I accept the service and the terms you mention." The vessel proceeded up the Niger under the command of the plaintiff as far as Dagbo, when the plaintiff refused to proceed further and abandoned the command.

*Held*, that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost or divested by the plaintiff's desertion or abandonment of the contract. *Taylor v. Laird*, 266

#### (2). *Implied Condition.*

Upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease. *Kintrea v. Persson*, 357

#### (3). *Warranty.*

The plaintiff and defendant, by their agent, contracted as follows:—"Sold for W. to H. 400 tons, provided the same be shipped for seller's account more or less Aracan Necrensie rice at 11*s. 6d.* per cwt. for Necrensie, or at 11*s.* per cwt. for Larong, the latter quantity not to exceed 50 tons, or else at the option of buyers to reject any excess, to be paid for by cash on arrival of the

vessel at the port of call on delivery of the bill of lading, charter-party and policy of insurance, insurance effected to the full amount of the invoice." The vessel loaded 285 tons of Larong and 150 tons of Latourie rice.

*Held*, first, that the contract did not contain a warranty that the rice should consist of Aracan Necrensie rice, but that the contract was conditional upon a cargo of Aracan Necrensie rice being shipped on seller's account.

Secondly, that the buyers were not entitled to the delivery either of the whole cargo or of the Larong rice, because the contract was for an entire cargo which would substantially satisfy the description of Aracan Necrensie rice. *Vernede and Others v. Weber*, 311

#### CONVEYANCE.

*See DRAIN.  
MINE (3).*

#### CONVICTION.

*See GAMING.*

#### COPYHOLD.

*See BOROUGH ENGLISH.  
GAME.*

#### *Fines on Allotment.*

In 1766 an Act was passed for allotting, dividing, inclosing, and draining fens within the manor and parish of Bourn. It recited, amongst other things, that there were within the manor certain open fields and certain large fens, that the Earl of Exeter was lord paramount of the manor of Bourn, and a considerable proprietor of lands in the fields, &c., and also of several commonable cot-

tages within the said manor; that G. Pochin was lord of the manor of Bourn Abbotts, being a distinct manor with the said manor of Bourn; and also a proprietor of lands and of commonable cottages within the said manor, and that divers other persons were owners and proprietors of the residue of the lands and commonable cottages within the said manor; and that the said Earl and G. Pochin, as lords of the manors, were owners of the soil of the said several fields, fens, and commons, and the said several proprietors were entitled to the herbage thereof; that the owners and proprietors of the said common fens were desirous that the same should be divided and inclosed and allotted to the several owners and proprietors thereof, and to the persons having right of common and other interest therein, in lieu of, and in proportion to their several respective interests and right of common. By sect. 6 it was enacted, that the commissioners "shall set out and allot the fields and meadows in manner therein mentioned, that is to say, to the Earl as lord paramount three acres, as a compensation for his right to the waste in the fields and hamlets in the parish of Bourn; and the residue of the fields and meadows amongst the persons entitled to lands, property, and right of common therein: and shall also set out and allot the fens, in the first place twenty acres to the lords of the said manors, in lieu of their brouage and rights to the wastes and soil in the said fens, viz.: ten acres to the said Earl as lord paramount, five acres to the said Earl as lord of the copyhold manor of Bourn, and the remaining five acres to Pochin as lord of the manor of Bourn Abbotts; and shall also set out a cowpasture to be enjoyed by the owners of commonable houses, &c., and the same shall for

ever thereafter go along and be of the same tenure with such houses, &c.; and shall set out and allot unto and amongst the proprietors of commonable houses six acres, &c., quantity and quality considered, which shall be in lieu of and as a compensation for their right and property in the said fens as proprietors of the said houses, &c.; and shall also set out and allot the residue, &c., unto and amongst Sir J. H. and the several other proprietors of fields, meadows, and ancient enclosures within the said parish having right of common in proportion to the several estates and properties which they have therein respectively." Section 10 provided, that in case any of the proprietors of allotments, to be made by virtue of this Act in the said common fens, in lieu of copyhold estates, shall desire to have their allotments enfranchised, it shall be lawful for the commissioners to allot a quantity of land, equal to two-thirteenth parts of such allotments respectively, to the lord of the manor; and that such allotments, in lieu of copyhold interest, shall for ever, after the executing the award, be deemed freehold. The Act contained a saving of the rights of the lords of the manor. The commissioners in pursuance of the Act allotted to the lords certain lands as a compensation for their brouage and right to the wastes and soil in the fens. They also allotted certain lands to the owners of commonable houses, &c., and of enclosures being copyholds within the manor. The commissioners allotted these lands as copyhold, and from the time of the passing of the Act fines had constantly been paid to the lord on the admission of tenants to such allotments.—*Held*, that allotments so made in respect of copyhold tenements within the manor, not having

been enfranchised under the provisions of the 10th section, were of copyhold tenure.

By an inclosure Act, passed in 1766, the commissioners were to allot a cowpasture, to be enjoyed by the owners of commonable houses, and to be used as a cowpasture only from May Day to Martinmas, and from Martinmas to Lady Day, "and it was provided the same should for ever thereafter remain, go along with and be of the same tenure with such houses, &c., but should not be subject or liable to any fee or fine whatsoever to the lord." The commissioners made their award and set out the cowpasture. By an Act passed in 1772, for the purpose of dividing the cowpasture, it was enacted, that the commissioners, after making certain other allotments, should set out the residue of the cowpasture unto and amongst all and every the proprietors of commonable houses, &c.; "and that all the allotments which should be made of the said cowpasture, should for ever thereafter remain and be of the same tenure with such houses, &c." The cowpasture was divided and allotted, under the Act of 1772, to the owners of commonable houses.—*Held*, that the provision in the Act of 1766, that such parts of the cowpasture as were copyhold should be held without payment of fines to the lord, exempted the owners of the copyhold tenements in the cowpasture, when divided and held in severalty, from payment of fines to the lord. *Pochin v. Duncombe*, 842

## CORPORATION.

*See MUNICIPAL CORPORATION.*  
*VAN DIEMAN'S LAND COMPANY.*

## COSTS.

*See ARBITRATION, (2).*

BILLS OF EXCHANGE ACT, (2).  
COUNTY COURT, (2).  
PLEADING, I. (1).  
PRACTICE, (3).  
WRIT OF TRIAL.

(1). *Short-hand Writer's Notes.*

The successful party on a reference is not entitled to the costs of a short-hand writer's notes of the evidence, although the attendance of a second counsel, or of an attorney's clerk, to take notes would be allowed. *Croomes v. Gore and Others; Same v. Easton and Another*, 14

(2). *Rule to Strike out or Amend Pleading.*

If in pursuance of section 52 of the Common Law Procedure Act, 1854, a rule to strike out or amend a pleading as framed to prejudice the fair trial of the action is made absolute in its terms, the party obtaining it gets the costs as costs in the cause. If, when cause is shewn, the rule is varied, the plaintiff will not get the costs, unless by the rule the Court expressly gives them to him. *Barnes v. Hayward*, 242

(3). *Habeas Corpus.*

A plaintiff having been brought up by habeas corpus to give evidence in one cause, when at the assizes gave evidence in another cause against the same defendant. Having succeeded in the first and failed in the second cause,

*Held*, that on taxation of the costs of the first cause, he was entitled only to one moiety of the costs of the habeas corpus. *Griffin v. Hoskyns, Esq.*, 95

## COUNSEL.

*See LIBEL.*

PRIVILEGED COMMUNICATION.

## COUNTY COURT.

*See BILLS OF EXCHANGE ACT, (2).*

JUSTICE OF THE PEACE.

PLEADING, I. (1).

WRIT OF TRIAL.

(1). *Title to Land.*

In a suit in a County Court, when on the hearing it appears that title to land is disputed, the Judge has no power to nonsuit the plaintiff or to award costs to the defendant. *In the Matter of a Plaintiff, in the County Court of Bedfordshire, between Lawrence and Partridge and Another,* 621

(2). *Costs.*

On an application for costs, under the County Court Act, 15 & 16 Vict. c. 54, s. 4, it is sufficient for the plaintiff to establish a *prima facie* case, so as to call on the defendant for an answer. Therefore where the plaintiff's affidavit disclosed some evidence that the defendant did not dwell or carry on his business within the jurisdiction of the County Court within which the cause of action arose, and it appeared that after diligent inquiries the plaintiff was unable to ascertain the residence of the defendant, and his attorney refused to give any information.—*Held*, that there was sufficient ground for an order that the plaintiff should recover his costs. *Springbett v. King,* 662

(3). *Prerogative of Crown.*

The prerogative of the Crown to remove into the Court of Exchequer a cause in another Court touching the Crown revenue, is not affected

by the County Courts Act, 9 & 10 Vict. c. 95. *Mountjoy v. Wood,* 58

## COVENANT.

*See LANDLORD AND TENANT, (3).*

MINE, (2).

PLEADING, II. (3).

(1). *Not to Charge Chattels Mortgaged.*

A trader assigned his household furniture by a mortgage deed which provided that the trader should quietly enjoy until default had been made in payment after demand. The deed contained a covenant by the trader not to execute, do or suffer any act, deed, matter or thing, by means of which the premises should be assigned, charged, or prejudicially affected; or whereby the mortgagee might be hindered from receiving, recovering or taking possession of the same. *Held*, that filing a declaration of insolvency in pursuance of the 70th section of the Bankrupt Law Consolidation Act, 1849, while the goods were allowed to remain in the possession of such trader was a breach of the covenant. *Hill v. Cowdery,* 360

(2). *To work Salt Mine.*

A declaration stated, that by deed, the plaintiff let to the defendants a certain mine of rock salt for twenty-one years from the 25th June, 1851; and the defendants covenanted with the plaintiff, that they would in every year during the term, get and raise from the mine 2000 tons of rock salt, and in case of default would, at the expiration of the year, pay the plaintiff 6d. a ton for every ton by which the quantity was less than 2000: and also that they would, with all reasonable diligence, sink a shaft to the salt rock in order to get at

the salt: and would also during the continuance of the term, work the mine in a proper and workmanlike manner.—First breach: that although the defendants did not raise or get out of the mine the annual quantity of 2000 tons of salt, yet they have not paid for the quantity short of 2000 tons.—Second breach: that the defendants did not in every year of the term get and raise 2000 tons, and did not pay for the quantity short of 2000 tons, but on the contrary got and raised no salt whatever, and refused to pay the plaintiff any sum whatever.—Third breach: that they did not use all reasonable diligence to sink a shaft to the salt rock in order to get at the salt; but wholly omitted and neglected so to do.—Fourth breach: that the defendants did not during the continuance of the term work the mine in a proper and workmanlike manner, but permitted the same to be unworked. The defendants pleaded, Secondly: that the deed provided that in case the rock salt should, during the continuance of the term, fail by any inevitable accident, then, on payment of all rent due and performance of all covenants on the part of the defendants, the term should cease and determine to all intents and purposes whatsoever: that the salt during the continuance of the term failed by inevitable accident; that all rent due was paid and covenants performed; and thereupon the term ceased and determined. Thirdly to the third breach: that the defendants did with all reasonable diligence sink a shaft to the salt rock. Fourthly to the fourth breach; that the defendants did at all times during the continuance of the term work the mine in a proper and workmanlike manner. Upon which pleas issues were joined. At the trial it appeared that by an agreement in writing,

dated the 29th August, 1851, the plaintiff agreed, before the 25th March then next, to demise to the defendants the salt mine in question for twenty-one years from the 25th June, 1851. When the agreement was executed, the defendants began to sink a shaft for the purpose of getting the salt. This sinking was, in September, 1851, discontinued in consequence of an influx of brine. The defendants thereupon began to sink another shaft which was in the same month discontinued from the like cause. On the 16th November, 1852, a lease, pursuant to the agreement, was executed, being the deed declared on and which contained the proviso for ceaser stated in the second plea. In consequence of the influx of brine before mentioned the defendants never in any manner worked the mine, nor paid any of the rents. The jury found that the defendants could not have worked the mine by any reasonable application of labour, diligence, skill, money, or other means, and that they were prevented from working it by the influx of brine.

*Held:* First, that as the term commenced in point of interest on the 16th November, 1852, though its duration as to computation of time was to be reckoned from the 25th June, 1851, the proviso for ceaser, which referred to a failure by inevitable accident *during the continuance of the term*, never came into operation; and that as the defendants had entered into an absolute unqualified covenant to get 2000 tons of rock salt in each year, or pay for the deficiency, they were liable; for whether the salt could be got easily or with difficulty, or whether it existed at all, was immaterial.

Secondly: that the plaintiff was entitled to the verdict on the issue raised by the third plea, for the defendants having, after their in-

ability to reach the salt by reason of the influx of brine, covenanted with all reasonable diligence to sink the shafts down to the salt, they were bound to do so, although it might be an unreasonable application of time and labour.

Thirdly: that the plaintiff was also entitled to the verdict on the issue raised by the last plea, since the defendants must be taken to have covenanted to work the mine *in some way*, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether.

*Semble*: that if the lease had been executed before the interruption of the works by the influx of brine, that would have been "a failure by inevitable accident" within the proviso for cesser. *Jervis v. Tomkinson and others*, 195

#### (3). Restraint of Trade.

A declaration alleged that the plaintiff, having obtained a patent for improvements in slubbing machines for a term of fourteen years, by indenture granted to the defendant licence to use the invention in England both in the making of new machines and the alteration and adaptation of old ones, and to sell the articles so produced, adapted and applied, for the residue of the term of fourteen years, paying to the plaintiff a certain royalty; and the defendant covenanted with the plaintiff, that he would not during the continuance of the licence make or send any slubbing machines without the invention of the plaintiff applied to them.—*Breach*: that the defendant made and vended large numbers of such machines without the invention of the plaintiff applied to them.—*Plea*: that the defendant made and sold several slubbing machines with

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the plaintiff's invention applied to them, and was at all times ready and willing to use the invention in practice, and that he used his best endeavours to procure manufacturers to employ him to make slubbing machines with the invention applied thereto, and to purchase them from him; nevertheless the invention was so worthless, that he was unable to induce any person to employ him to make any machines with the invention applied thereto, or to alter or adapt any old machines to it, or to use the invention in any other manner, or to induce any person to purchase any machine with the invention applied thereto: by reason whereof the defendant was unable to use or vend the invention, or use the licence, which became wholly useless to him, wherefore he made and vended machines without the invention applied.

*Held*, first that the covenant in the declaration was not void, as being in restraint of trade.

Secondly, that the plea was bad, since it was a plea to the damages only. *Jones v. Lees*, 189

#### (4). Right of Alienee of Land to sue—Amendment.

The declaration alleged that F., being seised in fee of an estate by indenture, granted to the defendant licence to dig, work, and search for china clay, and to raise, get, and dispose of the same to his own use, to hold and exercise the said liberties for the term of 21 years; and the defendant covenanted with F. and his assigns that he would pay compensation to F. and his assigns, and his lessees and tenants, for all enclosed lands which he might injure; the amount of such compensation to be ascertained, in case of difference, by two arbitrators, one to be appointed by the defendant and the

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other by F. and his assigns; and also that the defendant or his assigns would deliver up the works in repair at the expiration of the term: that after the making of the indenture F. conveyed all his estate to the plaintiff; and alleged as breaches: 1st. That though, after the assignment to the plaintiff, the defendant injured certain enclosed lands; and that, though the plaintiff appointed an arbitrator, yet the defendant refused to do so. 2ndly. That the defendant at the expiration of the time did not deliver up the works in repair. At the trial it was proved that the injury to the enclosed lands was before the assignment to the plaintiff. The plaintiff then applied for leave to amend the declaration, by alleging that injury was before the assignment to him.—*Held*, First, that such amendment would have made the first breach bad; Secondly, that if this were otherwise it could not be allowed, because no amendment ought to be allowed which would make the pleading so amended open to a demurrer: Thirdly, that the covenant to deliver up the works in repair ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to enter and take the clay, and that therefore the plaintiff, the alienee of the land, could sue upon it. *Martyn v. Williams*, 817

## CROSS-EXAMINATION.

*See LIBEL.*

## CROWN DEBTOR.

*See PRACTICE*, (9).

## CUSTOM.

*See CHARTER-PARTY*, (1).  
*WATERCOURSE*, (2).

## CUSTOM OF THE COUNTRY.

*See LANDLORD AND TENANT*, (3).

## DAMAGE.

*See PLEADING*, I. (3).

*For Breach of Contract to convey Railway Passenger.*

A tradesman took a ticket to go by railway from London to Hull. On arriving at Grimsby he found no train ready to take him to Hull the same night, as it should have been according to the published time-bill. He slept at Grimsby, and in the morning paid 1s. 4d. fare to Hull. In consequence of the delay, he failed to keep appointments with his customers, and was detained for many days.

*Held*, that though he would have been entitled to have performed the contract at the expense of the Railway Company, yet, not having done so, that he was not entitled to recover anything more than nominal damages in addition to the 1s. 4d., and perhaps the cost of his bed, &c. at Grimsby. *Hamlin v. The Great Northern Railway Company*, 408

## DEBTOR AND CREDITOR.

*See COMPOSITION.*

## DEED OF ARRANGEMENT.

*See BANKRUPT*, (2).

## DELIVERY ORDER.

*See VENDOR AND VENDEE.*

## DEMURRER.

*See PRACTICE*, (4).

## DETINUE.

*See PLEADING, II. (2).*

## DEVISE.

(1). *Estate Tail.*

A testator by his will made in 1812, after giving his property to his wife "for her natural life," devised as followed: "Also I give to my grandson R. P., that house, &c., with the garden now in the tenure of, &c. Also I give to my granddaughter Ann, the house I now live in with the garden, &c. Also I give to my two granddaughters S. P. and J. P. a house, &c. Also I give to the said S. P. and J. P. a piece of arable land now in the tenure of, &c., all to be equally divided. Also I give to my grandson R. P., 600*l.* 5 per cents. Also I give to my granddaughter Ann, 600*l.* 5 per cents. Also I give to my two granddaughters S. P. and J. P., 400*l.* each, now on bond in the Bank of England. In case either of them die without issue that portion to be divided amongst the survivors."

*Held*, that Ann took an estate tail in the house and land devised to her.  
*Thomas v. Butt*, 109

(2). *Misdescription.*

By will dated in 1804, S. M. devised all his lands in Doynton to his daughter Mary for life, with remainder over. The testator was possessed of a farm in the parish of Doynton. One piece of land, part of this farm, and surrounded by land in Doynton, was in fact in the parish of Wick and Abson; but in 1804 was generally reputed to be in Doynton.

*Held*, that it passed under the will. The tenants of the piece of land in question, proved that they had been rated in Wick and Abson since 1824. In answer to this, the defendants put

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in the rate books of the parish of Wick and Abson from 1780 to 1824, to shew that the names of the occupiers of this piece of land did not appear in the rate books of that parish prior to 1824. *Held*, that the rate books from 1780 to 1823 were receivable to rebut the presumption arising from the proof of the rating since 1823.

*Semble*, per *Pollock*, C. B., and *Martin*, B., that if a person to whom a particular estate is given by will for his life takes possession, and is allowed to keep as part of that estate something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman. *Anstee v. Nelms*, 225

## DISCOVERY.

*See COMMON LAW PROCEDURE ACT, 1854, (4).*

## DISTRESS.

*See PLEADING, I. (5).*

*Execution of Joint Warrant.*

A joint warrant to two persons to distrain for drainage rates, under an Act for draining certain fens and improving the navigation of a river, may be well executed by one of them. *Lee v. Vessey, Mastin and Others*, 90

## DISTRICT RATE.

*See PUBLIC HEALTH ACT, 1848.*

## DRAIN.

*Right to Use of Drain communicating with adjoining House.*

Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and

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subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose.

The plaintiff's and defendant's houses adjoined each other. They had formerly been one house and were converted into two by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that the plaintiff took a conveyance of his house. At the times of these conveyances, a drain ran under the plaintiff's house and thence under the defendant's, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and there ran into a drain on the plaintiff's premises and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. — *Held*, that the plaintiff was, by implied grant, entitled to have the use of the drain as it was used at the time of the defendant's purchase of his house. *Pyer v. Carter*, 916

**EASEMENT.**

*See DRAIN.*

**EJECTMENT.**

*See PRACTICE, (8).*

**EQUITABLE PLEA.**

*See COMMON LAW PROCEDURE ACT, 1854, (1).  
FEME COVERT, (2).*

**EQUITABLE REPLICATION.**

*See COMMON LAW PROCEDURE ACT, 1854, (2).*

**FEME COVERT.**

**ERROR.**

*See COMMON LAW PROCEDURE ACT, 1852, (2).*

A defendant may bring error on a judgment for the plaintiff on demurrer to a replication to one of several pleas, though the plaintiff has subsequently discontinued the action except as to the costs of the demurrer, 54

**ERROR CORAM VOBIS.**

*See PRACTICE, (6).*

**ESTATE TAIL.**

*See DEVISE, (1).*

**ESTOPPEL.**

*See PLEADING, II. (3).*

**EVIDENCE.**

*See DEVISE, (2).  
JOINT STOCK COMPANY, (4).  
LANDLORD AND TENANT, (4).  
PRIVILEGED COMMUNICATION.*

**EXECUTION.**

*See BANKING COMPANY.  
JOINT STOCK COMPANY, (1).  
PLEADING, (4).  
PRACTICE, (7).*

**EXTENT.**

*See PRACTICE.*

**FEE-FARM RENT.**

*See LAND TAX.*

**FEME COVERT.**

(1). *Action by Wife alone.*  
A feme covert cannot sue alone on

## FOOTWAY.

a contract made with her before or after marriage though her husband is an alien enemy. *Ann De Wahl v. Braune*, 178

(2). *Directions respecting her separate Property.*

T., a married woman, being entitled for her separate use to the dividends of certain government stock standing in the name of plaintiff as her trustee, the plaintiff gave to the defendants, a banking Company, a power of attorney to receive the dividends and at the same time directed them to pay the dividends to T. T. directed the defendants to pay the dividends to S. & B., bankers at Brussels, to whom she had pledged them for advances made by S. & B. to her husband. The defendants for some time paid the dividends to S. & B., but at length T. wrote to the defendants stating that in future she intended to receive the dividends herself. The defendants, notwithstanding this notice, received the ensuing half-yearly dividend, and transmitted it to S. & B. The plaintiff having sued the defendants for that dividend: *Held*, that the facts did not support a plea of payment to T., for being a married woman she was incapable at law of making a binding contract in respect of her separate property.

*Sembla*, per *Pollock*, C. B., that the facts could not be pleaded by way of equitable defence, since a Court of law could not work out all the equities of the case. *Clerk v. Laurie, Public Officer of the Union Bank of London*, 452

## FIERI FACIAS.

*See PRACTICE*, (7).

## FOOTWAY.

*See INCLOSURE ACT.  
PLEADING*, I. (3).

## FRAUDS (STATUTE OF). 975

### *Stopping up.*

It is no ground of action that a person, by stopping up on his own land the continuation of a public footway over his neighbour's land, causes the public to trespass on other parts of his neighbour's land, to his damage. *Blaggrave v. The Bristol Waterworks Company*, 369

## FOREIGN BILL.

*See BILL OF EXCHANGE*, (1).

## FRAUDS (STATUTE OF).

(1). *Contract within 4th Section.*

A contract for service for more than a year, but subject to determination within the year on a given event, is within the 4th section of the Statute of Frauds, and must therefore be in writing. *Dobson v. Collis and Another*, 81

(2). *Contract within 17th Section.*

The plaintiff, a printer, verbally agreed to print for the defendant 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, and after the proof sheet of the dedication was revised by the defendant and returned to the plaintiff; he, for the first time, discovered that it contained libellous matter, and refused to complete the printing of it.

*Held*: First, that this was not a contract for the sale of goods within the 17th section of the Statute of Frauds as extended by the 9 Geo. 4, c. 14, s. 7.

Secondly, that as the dedication was libellous the plaintiff was justified in refusing to complete the printing of it, and was entitled to recover for printing the treatise. *Clay v. Yates*, 73

(3). The defendant agreed to purchase of the plaintiff certain goods at a discount of 25 per cent. from a list of goods with prices annexed, and he signed an order for the goods referring to the list. The terms as to discount were not mentioned in the order. The defendant afterwards wrote to the plaintiff requesting him to send the invoice, which he did. The defendant wrote in reply a letter, signed by him, returning the invoice and declining to take the goods. *Held*, first, that the order was not a sufficient memorandum of the bargain within the 17th section of the Statute of Frauds, as it did not contain the price: Secondly, that the letter returning the invoice was not a sufficient admission of the contract as stated in the invoice, so as to satisfy the statute. *Goodman v. Griffiths*, 574

(4). The plaintiff put up for sale by public auction a quantity of timber, several lots of which were unsold. A few days afterwards the defendant called on the auctioneer and selected from the catalogue two of the unsold lots, which he agreed to purchase. The auctioneer then wrote in the defendant's presence his name in the catalogue opposite these lots: *Held*, that the auctioneer was not the agent of the defendant so as to bind him by signing his name, and consequently there was no sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds. *Mews v. Carr*, 484

#### FREIGHT.

*See CHARTER-PARTY*, (4).  
*SHIP*, (1), (2).

#### GAME.

##### *Exclusive Right of Lord of Manor.*

The plaintiff's father was lord of a manor, within which was a stinted

pasture, and as such lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and privileges upon and over it, and to the exclusive right of hunting, shooting, fishing, and fowling; but there was no right of free warren. The plaintiff's father and other persons were owners of tenements within the manor, and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates and to rights of common of turbary. In 1811 an act of parliament was passed for enclosing the pasture. This Act recited that the plaintiff's father was lord of the manor; that there was within the manor the said stinted pasture; that he as lord was owner of the soil and entitled to all mines and minerals and to other rights, royalties, liberties, and other privileges in and over it; and that he and other persons were owners of tenements within the manor and of shield rooms upon the pasture, in respect whereof they were entitled to cattlegates on it and to rights of common of turbary and other rights therein. The Act then recited that it would be of benefit to the persons interested if the pasture was divided and allotted severally amongst the persons entitled to cattlegates thereon, and proceeded to appoint commissioners for that purpose. The Act directed the commissioners to allot to the plaintiff's father as lord of the manor, his heirs and assigns, one-twelfth part of the pasture "in lieu of, and in full recompence and satisfaction for all his right and interest, as lord of the said manor, of, in, and to the soil of the residue of the said stinted pasture." The Act then directed that the residue of the pasture should be allotted to the plaintiff's father and other persons entitled to cattlegates, rights of common, and other rights upon it, and the allotments were

declared to be freehold. The Act resorved to the plaintiff's father, and the lords of the manor for the time being, all mines under the pasture, and full powers were conferred on them for working the mines. The Act also provided that nothing therein contained should prejudice, lessen, or affect the right, title, or interest of the plaintiff's father, his heirs, &c., lords of the manor for the time being, in or to any seignories, royalties, rights, or services incident or belonging to such manor; but they should and might at all times thereafter hold and enjoy the same respectively, and all rents, services, fines, courts, &c., "and also right of hunting, shooting, fishing, and fowling in, through, and over the said stinted pasture and every part and allotment thereof; and all other seignories, royalties, and privileges to the lords of the said manor for the time being incident and belonging (other than and except those which were expressly declared to be barred, destroyed, and extinguished by that Act) in as full, ample, and beneficial a manner as they respectively could or might have held and enjoyed the same in case this Act had not been passed." In 1814 an allotment in the pasture was made to the plaintiff's father in respect of an estate called Woodside, and an allotment called the Clint allotment was made to J. E. in respect of a customary tenement. In 1823, the plaintiff's father agreed with the defendant's grandfather to exchange the Woodside allotment for an allotment belonging to the latter. This exchange was effected by two deeds, dated the 1st of February, 1823. One of these deeds was made between the plaintiff's father and the plaintiff of the one part, and J. E. of the other part: and by it the former conveyed to the latter the Woodside allotment with a reser-

vation to them and the lords of the manor of the mines and minerals, and also the liberty and privilege of hunting, hawking, coursing, shooting, and fishing, and fowling over the said tenement, &c. By the other deed, which was between the same parties, J. E. conveyed to the plaintiff's father the land by him agreed to be given in exchange for the Woodside allotment, and he granted to the plaintiff's father and the lords of the manor the same right of sporting, and he covenanted to allow them to proceed against trespassers in his name. In 1829 the Woodside allotment came by descent to the defendant's father, and in 1846 he purchased the Clint allotment. Since 1831 the owner of these allotments sported over them, claiming to do so as of right, and the plaintiff during the same time exercised the right of shooting concurrently. In 1852 the defendant's father claimed the exclusive rights of sporting over the Woodside and Clint allotments, and the defendant did so with his authority.

*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the plaintiff had the exclusive right of sporting over the Clint allotment. (*Erle, J., and Willes, J., dissentientibus*).

*Held* also, (affirming the judgment of the Court of Exchequer), that the plaintiff had the exclusive right of sporting over the Woodside allotment. *Sir James Graham, Bart. v. Ewart*,

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Bretherdale Bank is a track of inclosed pasture land within the manor of Bretherdale in the county of Westmoreland. Bretherdale Bank had been from time immemorial subject to eighty customary rights called cattlegates. The plaintiff was lord of the manor of Bretherdale. The defendant was seized of certain

cattlegates as a customary estate of inheritance. The plaintiff was also owner of a cattlegate which came to his predecessor, as lord of the manor, by seizure quoique for nonpayment of a fine. Bretherdale Bank is separated from Bretherdale Waste by a fence which the cattlegate owners kept in repair with stones got from Bretherdale Bank and from the adjoining waste. Each cattlegate gave the owner thereof a right of depasturing on Bretherdale Bank a certain number of cattle and sheep from the 26th of May to the 24th of April, but neither cattle nor sheep were allowed to pasture there between 24th of April and the 26th of May. An alteration had been made in the time of stinting by substituting the 26th of May for the 1st of June; but it did not appear that the lord of the manor had any notice of the alteration, and the court rolls did not contain any mention of stinting. The whole of the cattle and sheep depastured Bretherdale Bank in common. A frithman was appointed by the cattlegate owners, whose duty it was to take care that Bretherdale Bank was properly stinted, and he was remunerated for his trouble by the cattle owners. A cattlegate owner having a house within the manor had also a right to cut peat for consumption in his house. By 46 Geo. 3, c. lxiv., authority was given to the lord of the manor to enfranchise any copyhold or customary messuages, cottages, lands, tenements, or hereditaments, parcel of the manor; and several cattlegates were enfranchised under this Act; but there was no distinction in point of enjoyment between the enfranchised and the customary cattlegates. From time immemorial the cattlegates had been held of the lord of the manor as customary estates of inheritance by payment of

fine certain, rents of small amount being payable annually for each cattlegate, and under dues, duties, suits, and services of right accustomed. On the death of a cattlegate owner, the cattlegate descended by custom to the heir at law, who was admitted at the lord's court, when he paid a fine. The cattlegates also passed by customary deed, followed by admittance at the next lord's court, or out of court by the steward of the manor. The deed was brought into Court by the alienee, and was presented by the jury or homage. A fine was payable on the admittance, but there was no heriot due. On the death of the lord of the manor, the owners of cattlegates could be compelled by the custom to be admitted by the new lord and to pay a fine. The lord was entitled to seize quoique for nonpayment of fines. On alienation by a feme covert, the woman was examined apart from her husband. The lords of the manor had always searched for, pursued, and killed grouse and other game on Bretherdale Bank, no other person having claimed to do so, or ever having done so except by their license. Since 1819 the lords of the manor have preserved the game.

In an action by the plaintiff against the defendant for shooting on Bretherdale Bank without the plaintiff's permission.—The first count was trespass for entering the plaintiff's close and killing grouse and other game there: the second trover for grouse of the plaintiff: the third case for the disturbance of the plaintiff's exclusive right of shooting grouse on Bretherdale Bank. The defendant pleaded; first, not guilty to the whole declaration: secondly, to the first count, that the land was not the land of the plaintiffs: thirdly, to the first count, that the land was defendant's soil and freehold:

fourthly, to third count, a traverse of plaintiff's exclusive right as claimed: upon which issues were joined. Proceedings in error having been taken on a special case stating the above facts.—*Held*, in the Exchequer Chamber, first, that the cattlegates gave the owners no right to the possession of the soil, but that the ownership of the soil remained in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners, and consequently the lord might maintain trespass against a cattlegate owner for sporting over it without his permission; and on these pleadings the plaintiff was entitled to judgment on the first and second counts.

Secondly, that the facts stated did not warrant a judgment for the plaintiff on the third count. *Bigg v. Earl of Lonsdale*, 923

#### GAMING.

*See PLEADING*, II. (1).

*In Railway Carriage.*

A prisoner was convicted of playing in a certain open and public place, to wit, a carriage used on a railway, with an instrument of gaming.

*Held*, that the conviction was bad, it not shewing that the carriage was being used for the conveyance of passengers on the line. *In re Free-stone*, 93

#### GARNISHMENT.

*See COMMON LAW PROCEDURE ACT, 1854*, (5).

#### GRANT.

*See MINE*, (1).

*WATERCOURSE*, (2).

#### GUARANTEE.

##### *Past and Future Transactions.*

A guarantee given by the defendant to the plaintiff was as follows:—“In consideration of the credit given by B. to E., I hereby agree to guarantee the payment of all bills of exchange drawn by the said B. and accepted by E. Also I hereby agree to guarantee the payment of any balance that may be due from the said E. to the said B. This guarantee to include all bills of exchange now running as well as the balance of account at this day.”—It appeared that at the time of the giving of the guarantee there were bills running and an account due from E. to B., and future dealings between the parties were contemplated.

*Held*, that the guarantee extended to future as well as to past transactions: per *Pollock*, C. B., and *Martin*, B., *Bramwell*, B., *dissentient*. Also per *Pollock*, C. B., and *Martin*, B., that the principle of construction *ut res magis valeat quam pereat* applied. Per *Bramwell*, B., that the words *prima facie* referred to past transactions; that the latter clause was explanatory and did not add to the former; and that the maxim in question does not apply in cases where there are extrinsic circumstances in relation to which the words used are in their primary sense intelligible. *Broom v. Batchelor*, 255

#### HABEAS CORPUS.

*See COSTS*, (3).  
*VAGRANT ACT.*

#### HIGHWAY.

*See INCLOSURE ACT.*

## HIGHWAY RATE.

*See PUBLIC HEALTH ACT, 1848, (1).*

## HOTEL.

*See NEGLIGENCE.*

## HUSBAND AND WIFE.

*See FEME COVERT, (1), (2).  
VAGRANT ACT, (2).**Liability of Husband for Debts incurred by Wife.*

A wife is the general agent of her husband with reference to such matters as are usually under the control of the wife. Therefore, where the wife of a labourer incurred a debt for provisions for the use of the family, the husband was held liable, though he had supplied his wife with money to keep the house. *Buddock v. Marsh,* 601

## INCLOSURE ACT.

*See COPYHOLD.**Stopping up Foot-path.*

An Inclosure Act empowered Commissioners, with the concurrence of two justices, to stop up, divert or turn, and to direct to be discontinued any public road or footpath through any part or parts of the lands and grounds in the parish of T. which to the Commissioners should appear useless; subject to an appeal to the quarter sessions. The Commissioners and two justices made an order stopping up a public footpath in the parish of T. which was continued as a footpath into the parish of S., whereby the part in the latter parish became useless as a public way.

## INCOME TAX ACT.

*Held*, that the Commissioners had power to stop up the part of the footpath in the parish of T., and that if any injury was thereby done, the remedy was by appeal.

*Sembles*, that the part of the footway in the parish of T. still remained a public way, though a cul-de-sac. *Gwyn v. Hardwicke,* 49

## INCOME TAX ACT, (5 &amp; 6 VICT. c. 65.)

*"Rent," within the meaning of 60th Section.*

By indenture the plaintiff, in consideration of 1,380*l.* to be paid by instalments, granted and sold to the defendant a mine of coal for a term of fifty years; and the defendant covenanted with the plaintiff to pay him 150*l.* on the execution of the indenture, and 150*l.* per year after that time, whether a quantity of coal equal to that amount, at and after the rate of 100*l.* per Lancashire acre, should be got out of the mine in the same year or not; and when in any year so many coals should be got out of the mine as would, at the rate of 100*l.* for every Lancashire acre of coals, amount to more than 150*l.* per year, then that the defendant would pay for every Lancashire acre of coal the sum of 100*l.*, and so in proportion for every greater or less quantity than an acre until the sum of 1,380*l.* should be paid: (it being the intent of the parties that the plaintiff should not, until the 1,380*l.* was paid, receive less than 150*l.* per year), the same yearly rents to be paid half-yearly on the 24th of June and 24th of December in each year. The defendant, who had never worked the mine, claimed to deduct from a half-yearly instalment a sum paid by him for income tax.

*Held*, that the instalment of 150*l.* per year was not "rent" within the meaning of the 60th section of the Income Tax Act, 5 & 6 Vict. c. 85; and that assuming it to be "an annual payment" within the meaning of the 102nd section, the plaintiff, and not the defendant, was liable to be assessed to the income tax. *Taylor v. Evans*, 101

## INEVITABLE ACCIDENT.

*See COVENANT (2).*

## INNKEEPER.

*See SLANDER.*

## INSOLVENT.

*See PRISONER.*

*Exception of Wearing Apparel.*

An insolvent seeking to except his wearing apparel, furniture, &c., under the value of 20*l.* from the operation of the 7 & 8 Vict. c. 96, must in his schedule specify each article and its value. It is not enough to state generally the character of the goods, and a gross sum as their value. *Taylor v. Roberts*, 96

## INSURANCE.

(1). *On Profits on Goods.*

An insurance on profits on goods laden on board a ship is an insurance on goods within 19 Geo. 2, c. 37, s. 1. And therefore an insurance on profits containing clauses prohibited by that statute is illegal. *Smith v. Reynolds*, 221

(2). *Alteration of Circumstances.*

The plaintiff effected a policy of assurance in which the subject-matter was thus described:—"On a range of buildings of three stories," curriers'

shops, &c., "part of lower story of said building being used as a stable, coach-house and boiler-house: no steam-engine employed on the premises: the steam from said boiler being used for heating water and warming the shops. N. B. The process of melting tallow by steam in said boiler-house, and also the use of two pipe-stoves in said building, are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein nor in any building adjoining thereto." The description of insurance were fourfold, "Common," "Hazardous," "Doubly Hazardous," and "Special Risks," and the policy stated, that "when Special Risks are proposed, the most particular specifications of the property, and all circumstances attending the same, will be required; but all which Special Risks must be particularised on the policy, to render the same valid or in force." One of the conditions indorsed on the policy was, that "if after the assurance shall have been effected, the risk shall be increased by" "any alteration of circumstances," and the particulars of the same shall not be indorsed on the policy by the secretary or some other agent of the Company, and a proportionate higher premium paid, if required, such insurance shall be of no force." The insurance in question was a "Special Risk." After the policy was effected the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam-engine, which was supplied with steam by the boiler mentioned in the policy. By the terms of the policy mills and manufactoryes having mill, steam or engine work were "Special Risks." No notice of the erection or use of the steam-engine was given to the Insurance Company. The premises were after

wards destroyed by accidental fire, not attributable to the erection or use of the steam-engine. At the trial it was agreed by the parties that the jury should find, and the jury did find, that the risk of fire or damage thereby was not increased by the erection or use of the steam-engine, or by the alterations in the insured premises.

*Held*, (per *Pollock*, C. B., and *Martin*, B., dissentiente *Bramwell*, B.), that the introduction of the steam-engine and use of the steam generated in the boiler to work it, was a material alteration in the subject-matter insured, and therefore avoided the policy.

*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the policy was not avoided by the introduction of the steam-engine, and the use of the steam generated in the boiler to work it. *Stokes v. Cox and Others*, 320, 533

#### JOINT STOCK BANK.

*See BANKING COMPANY.*

#### JOINT STOCK COMPANY.

*See BANKING COMPANY.*

COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

PLEADING, I. (4).

VAN DIEMANS LAND COMPANY.

##### (1). *Execution against Shareholder.*

An application, under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 36, for leave to issue execution against a shareholder on a judgment against the Company, was founded on affidavits which stated that a *fi. fa.* issued against the Company and was returned nulla bona; that the Company had not at the date

of the judgment, or since, any lands, chattels, goods or effects in England, Ireland or elsewhere, whereon the plaintiff could levy the amount of the judgment or any part thereof. *Held* sufficient. *Nixon v. The Kilkenny and Great Southern and Western Railway Company*, 47

Under 7 & 8 Vict. c. 110, s. 66, a judgment creditor, having failed to obtain satisfaction by execution against the effects of a Company completely registered under that Act, may proceed at once against a person who was a shareholder at the date of the contract on which the judgment is founded, but who has ceased to be a shareholder, without proceeding against the existing shareholders in the first instance.

An order for the winding-up of the Company, where no official manager has been appointed, has no effect upon the right of such creditor to issue execution against the shareholders. *Hill and Another v. The London and County Assurance Company*, 398

*Scire facias* against a shareholder on a judgment against a Joint Stock Company completely registered under the 7 & 8 Vict. c. 110. Plea: setting out the record, by which it appeared that the action was on a bill of exchange, accepted by two directors of the Company in the form prescribed by the 45th section of that Act, and indorsed to the plaintiff. The plea then stated that a clause in the Company's deed of settlement only authorized the directors to accept bills binding the shareholders to the extent of their shares, and that the defendant had paid up his shares. On demurrer,—*Held*, that the plea was bad; for, assuming that it would have afforded a defence to the original action, it could not now be pleaded to the *scire facias*. *Peddell v. Gwyn*, 580

(2). *Liability of Company on Bills of Exchange accepted by Directors.*

The deed of settlement of a Joint Stock Company completely registered, contained a clause authorizing the directors to accept bills of exchange: "provided that the bills due at any one time should not exceed 100,000*l.*, and that all such bills should be so made, issued, indorsed and accepted as to be binding on the Company and on the shareholders, and each of them, to the extent of the respective shares held by them in the capital stock of the Company, and no further or otherwise." The directors of the Company having accepted bills of exchange in the ordinary form, as prescribed by 7 & 8 Vict. c. 110, s. 45:—*Held*, that the Company was liable upon such bills. *Gordon v. The Official Manager of the Sea Fire Life Assurance Society*, 599

(3). *Promissory Note binding on Company.*

The following instrument was signed by two directors of a completely registered Joint Stock Company, and sealed with the seal of the Company.—"Three months after date we, two of the directors of The Ark Life Assurance Society, by and on behalf of the said Society, do hereby promise to pay to M. or order the sum of 67*l.* 15*s.* 6*d.*" value received. There was no counter signature by the secretary of the Company.

*Held*, a promissory note binding on the Company, and not the parties who signed it. *Aggs v. Nicholson and Another*, 165

(4). *Evidence of Registration.*

By 7 & 8 Vict. c. 110, s. 15, if certain returns made are conformable to the provisions of the Act, it is the duty of the registrar of Joint

Stock Companies to grant to a Company a certificate of complete registration, signed by him and sealed with his seal of office, which certificate is to set forth whether the Company has been constituted completely; and in the absence of evidence to the contrary any such certificate is to be received in evidence, without proof of the signature thereto or seal of office. By s. 25, on complete registration of any Company being certified by the registrar of Joint Stock Companies, such Company shall be and is thereby incorporated. By s. 19, the Committee of Privy Council for Trade may appoint an assistant registrar, and such assistant registrar shall, in the absence of the registrar, be competent to do all things which the registrar is authorized to do; and the provisions in the Act, relating to the signature and seal of office of the registrar, are to apply to the assistant registrar. *Held*, that a certificate of the complete registration of a Joint Stock Company, signed and sealed by the assistant registrar, is admissible as evidence of the complete registration of a Company, though it does not appear either on the face of the document or by evidence aliunde, that the registrar was absent at the time it was so signed and sealed: *Dubitante, Watson, B.*

The certificate of the annual return of the name and business of a Joint Stock Company, signed and sealed by the registrar of Joint Stock Companies, pursuant to 7 & 8 Vict. c. 110, ss. 14, 10, is evidence that the Company was a completely registered Company at the time such return was made. *Baker v. Cave*, 674

## JUS TERTII.

*See BANKRUPT, (1).*

## JUSTICE OF THE PEACE.

*See VAGRANT ACT.**Notice of Objection to being sued in County Court.*

A justice of the peace sued in a County Court for an act done in the execution of his office, having given notice, under the 11 & 12 Vict. c. 44, s. 10, that he objects to being sued in the County Court, cannot after such notice remove the plaint into the superior Court by certiorari.  
*Weston v. Sneyd,* 703

## LANDLORD AND TENANT.

*See PLEADING, I. (5).*(1). *Implied Condition for Re-entry.*

A proviso in a lease for re-entry on nonpayment of rent, is a condition which attaches to the yearly tenancy, created by the tenant holding over and paying rent after the expiration of the lease.  
*Eliza Thomas v. Packer,* 669

(2). *Implied Stipulation as to Notice to Quit.*

An agreement for a lease contained a stipulation that the tenancy should continue until after two years notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed. *Held*, that it could not be implied that the stipulation as to the two years notice to quit was one of the terms under which the tenant held.  
*Tooker v. Smith,* 732

(3). *Custom of the Country.*

A tenant held under a lease which

contained a covenant that he should cultivate the farm according to the custom of the country, and should with the last wheat crop lay down the same with 20 lbs. weight of good clover seed per acre, and continue the same so laid down for feeding, not to exceed three grounds belonging to the farm; and should during all the term consume with stock in the farm all the hay, straw and clover grown thereon; which manure should be used on the said farm; and that the lessor and his assignees would allow the lessee to occupy half the rooms in the house, and the barn, yards and granary, until Midsummer Day after the expiration of the said term, if necessary, to finish the cropping of the lessee grown on the premises thereby demised. Under the custom of the country the tenant would have been entitled to be paid for the straw and manure on leaving.

*Held*: the covenant, containing no provisions as to straw unconsumed on quitting, was not inconsistent with the custom of the country, and therefore that the plaintiff was entitled to be paid for his straw.  
*Muncey v. Dennis,* 216

(4). *Surrender by Operation of Law.*

Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law.  
*Dubitante, Bramwell, B.*

Lands belonging to a Dean and Chapter were usually leased for 21 years, and the leases renewed every seventh year for a further period of 21 years. It was proved to be the practice on the renewal of a lease to return the old lease to the office, when it was destroyed. If the person delivering up the existing

lease was not the same person to whom it was granted, the officer of the Dean and Chapter made inquiry as to the manner in which such person became interested in the premises, and on being satisfied of his interest, granted the renewed lease to him. W. in 1849, being in possession of certain lands leased to S. for 21 years from 1842, produced the lease of S. to the officer of the Dean and Chapter which was then cancelled. He obtained a new lease in his own name, and continued to occupy and pay rent till his death in 1856; after which his executrix delivered up the lease of 1849, and obtained a renewed lease in her own name.—*Held*, that the facts were evidence of the assent of S. to the grant of the lease of 1849 to W. by the Dean and Chapter.

In ejectment against a person who has entered forcibly without any title, evidence of prior possession is sufficient to entitle the plaintiff to recover; and the plaintiff does not lose his right to insist on such possession by setting up a title which he fails to establish in proof. *Darison and Others v. Gent*, 744

#### LANDS CLAUSES CONSOLIDATION ACT, 1845.

##### *Arbitration.*

A statute, incorporating a Waterworks Company, provided that all disputes respecting compensation, works, matter, or thing done or performed under the provisions of the Act should be determined by arbitration, under "The Lands Clauses Consolidation Act, 1845." *Held*, that the provision did not apply to a claim for compensation in respect of damage sustained by the interruption of a drain by reason of the works of the Company. *Blagrave v. Bristol Waterworks Company*, 369

#### LAND TAX.

##### *Redemption by Owner of Lands charged with Fee-Farm Rent.*

The owner of lands charged with a fee-farm rent, payable to a purchaser from the Crown under statutes 22 C. 2, c. 6, and 23 C. 2, c. 24, having redeemed the land tax chargeable on the lands out of which the fee-farm rent issues, is entitled under the land tax Acts, to deduct four shillings in the pound from the rent so payable. *Moody and Another v. The Dean and Chapter of the Cathedral Church of Wells, in the County of Somerset*, 40

#### LEASE.

##### *See CONTRACT, (2).*

*LANDLORD AND TENANT, (1), (2), (3), (4).*

*LICENCE.*

*PLEADING, II. (3).*

#### LIBEL.

##### *See FRAUDS, STATUTE OF, (2). PRACTICE, (1).*

##### *Proceedings on Trial.*

The plaintiff, a tidewaiter in Her Majesty's Customs, brought an action against the publisher of a newspaper for a libel, imputing to him that he was a papal rebel, a traitor, and an idolater; that he was a member of an association for the conversion of England to the Roman Catholic faith, and had enlisted himself in the service of a foreign potentate, and was bound never to decline from the purpose of annihilating all religious beliefs other than the Roman Catholic religion and Popery. The defendant pleaded, not guilty, and a justification of so much of the libel

as imputed to him that he was a member of the association, &c. At the trial, the plaintiff, who was a witness, stated that he was a Roman Catholic, and had subscribed money to an association for the conversion of England to the Roman Catholic faith; but had done no other act to become a member of it. — *Held*: First, that he could not be asked, on cross-examination, whether his name was not written in a certain book of the association, no notice having been given to produce the book.

Secondly (the plaintiff having admitted that he held himself bound by the canons and decrees of the Church of Rome), *Held*, that he could not be asked whether he considered himself bound by the notes and comments of the Rheims Testament, since that was an inquiry into his religious belief.

Thirdly (the plaintiff having given in evidence a paragraph in a subsequent newspaper containing similar imputations against the plaintiff), *Held*, that the defendant was not entitled to have read as part of the plaintiff's case, a paragraph in that newspaper on the subject of "Papal Prosecutions," but having no reference to the other paragraph.

Fourthly, (the defendant's counsel having intimated his intention not to call witnesses), *Held*, that he had no right, in order to shew the doctrines of the Church of Rome, to read in his address to the jury a Papal treaty with a Catholic State, nor canons, decrees or bulls of that church, nor the oath taken by Roman Catholic bishops, since those were matters of fact which ought to be proved.

Fifthly, *Held*, that the imputations being false in fact and without a justifiable occasion, the law implied malice.

Sixthly, *Held*, that there was no

#### LIMITATIONS (STATUTE OF).

misdirection in omitting to tell the jury not to give damages in respect of the publication subsequent to the libel. *Darby v. Ouseley*, 1

#### LICENCE.

*Determination by Assignment of Subject Matter.*

A licence is determined by an assignment of the subject matter in respect of which the privilege is to be enjoyed.

By lease not under seal, R. and C., trustees on behalf of themselves and the other proprietors of a theatre, demised it to S. for three years, reserving to themselves and the other proprietors free liberty of admission to the theatre. S., by lease not under seal, let the theatre to the plaintiff for two nights, subject to the terms on which he held the theatre.

*Held*, that the licence was determined, and that an action of trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theatre during his tenancy. *Coleman v. Sir W. Foster, Bart.* 37

#### LIEN.

*See COMMON LAW PROCEDURE ACT, 1854, (5).*

#### LIMITATIONS (STATUTE OF).

*See COMMON LAW PROCEDURE ACT, 1854 (2).*

##### (1). *Acknowledgment in Writing.*

The plaintiff having applied to the defendant for payment of a debt, the defendant wrote in answer, "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain

## LIMITATIONS (STATUTE OF).

as they are for a short time and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter."—*Held*, a sufficient acknowledgment in answer to a plea of the Statute of Limitations.

The question in these cases is, whether the statement as to the time of payment is merely an excuse or the condition on which payment is to be made. *Collis v. Stack*, 605

In answer to an application for payment of a debt the debtor wrote as follows:—"I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of paying and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance."

*Held*, no sufficient acknowledgment or promise to take the case out of the Statute of Limitations. *Rackham v. Marriott*, 234

### (2). *Admission of Debt to Person who purported to give Conditional Discharge.*

An admission of a debt made to a person who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of the Statute of Limitations, though the discharge was inoperative in itself, and was given upon a condition which the defend-

## LIVERPOOL DOCKS. 987

ant failed to observe. *Elizabeth Goate, Executrix of John Goate, v. T. R. Goate*, 29

## LIVERPOOL DOCKS.

### *Liability of Trustees.*

The trustees of the Liverpool Docks are a corporation receiving tolls and port duties, for the purpose of discharging a public duty, from which the members derive no emolument, and they have a discretion as to the application of their funds, and as to the time and manner in which they will repair the docks.

By 6 Geo. 4. c. clxxxvii., ss. 3, 4, it is provided that, in order to carry into execution the powers of the Liverpool Dock Acts a committee is to be appointed, twelve nominated by the corporation and eight by the merchants of Liverpool; and that the committee or any seven of them, including the chairman, who has the custody of the common seal of the trustees, should have, use, and exercise exclusively all and every the powers and authorities in relation to the execution and carrying into effect the several powers of the Liverpool Dock Acts, vested in the trustees by virtue of those Acts, subject to a power of veto in the trustees. *Held*, first, that though the trustees possessed sufficient funds to enable them to keep the docks in a proper condition, they were not responsible to the owners of a vessel injured by grounding on an accumulation of mud suffered to remain in the docks.

Secondly, that the trustees are not liable to an action for a neglect of duty by the committee. *Gibbs and Others v. The Trustees of the Liverpool Docks*, 439

## LOCAL BOARD OF HEALTH.

*See PUBLIC HEALTH ACT, 1848 (1), (2).*

## LOCAL AND PERSONAL ACT.

*See RAMSGATE HARBOUR ACT, (1).*

## LORD OF MANOR.

*See COPYHOLD.  
GAME.*

## MASTER AND SERVANT.

*See RAILWAY COMPANY, (1).*

MEMORANDA, 108, 281, 391,  
757.

## MEMORIAL.

*See BANKING COMPANY.*

MERCHANT SHIPPING ACT,  
1854.*Description of Gold in Bill of Lading.*

The Merchant Shipping Act, 1854, section 503, provides, that no owner of any sea going ship shall be liable to make good any loss that may happen without his actual fault or privity to any gold, &c., put on board such ship, by reason of any robbery, &c., unless the owner has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared the true nature and value of such articles.

*Held,* that a bill of lading describing a parcel of gold shipped as "one box containing about 248 ounces of gold dust" was not a sufficient statement of the value. *Williams v. The African Steam Ship Company,* 300

## MINE.

*See COVENANT, (2).*

*VARIANCE.*

*WATERCOURSE, (2).*

(1). *Right to enter on Surface Land  
for the purpose of working Mines.*

A declaration stated that certain lands were in the occupation of a tenant of the plaintiff, the reversion belonging to him, and that the defendant wrongfully dug out of the lands large quantities of stone, sand and soil; and carried away the same; and made large holes, excavations, and cuttings in and through parts of the lands, and erected large mounds and banks of earth and rubbish in and upon other parts of the lands, so as thereby permanently to alter, damage, injure and spoil the surface of the lands. Plea: that before any of the times when, &c., R., was and still is seized in fee of all the mines and quarries of stone under the earth or upon the earth, within certain parts of the lordship of B., and that R. and all those whose estate he had and has of and in the said mines and quarries within the said parts of the said lordship, from time whereof the memory of man is not to the contrary, have been used and accustomed of right, and still of right are used and accustomed, as often as it might be necessary for the purpose of effectually getting, winning, or working the said mines or quarries, within the said parts of the said lordship, to enter into and upon any lands within the said parts, within or under which the said mines or quarries were situate, such lands being or having been part of the waste of the lordship, and to dig, excavate, and cut into and through the same lands unto the stone of the said mines and quarries, and out of the holes and excavations

so made to raise, dig and get the stones of the said mines and quarries and carry away the same, doing no more than necessary for the purpose aforesaid.—The plea then stated that R. demised a quarry of stone, situate within and under the lands of the plaintiff in the declaration mentioned, being parcel of the said mines and quarries of stone within the said parts of the said lordship, to the defendant from year to year, and the plea then justified the acts complained of in the exercise of the above mentioned right. There were two other pleas under the Prescription Act, 2 & 3 Wm. 4, c. 71, alleging an enjoyment of the right by the defendant as occupier of the quarry for the respective periods of forty and twenty years. On demurrer,—*Held*, that the pleas were good, for the right claimed was not unreasonable and might have originated in grant. *Rogers v. Taylor*, 706

(2). *Meaning of term "Fairly wrought."*

A demise of coal mines for 80 years, yielding 400*l.* for every acre of coal, &c., by annual payments of not less than 200*l.*: provided that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out and gotten at any time prior to the expiration of the term, and that the said coal so fairly wrought should have been wholly paid for, then that the annual payment of 200*l.* should cease and be no longer payable.

*Held*, that the question whether the coal could be fairly wrought did not depend upon whether it could be worked at a profit or not, or whether any such coal as that demised was worth working, but assuming that coal of the same description as that demised could be properly

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worked, whether, according to the usage of miners, the coal in question could be worked without extraordinary difficulty or expense.

The learned Judge at the trial told the jury that he would not give them any explanation as to what was meant by "fairly" wrought, and that they were better judges of the meaning of the phrase than he was. He told them what he thought it meant.

*Held*, that this direction was insufficient. *Griffiths v. Rigby and Another*, 237

(3). *Conveyance.*

S. D., being seized in fee of certain lands under which were mines of coal, in June, 1805, mortgaged in fee the lands and mines to T. T. to secure 550*l.* and interest. S. D. by her will, dated the 15th September, 1809, devised to her seven children, as tenants in common in fee, all the mines under the said lands, and all her real estates (except the said mines to J. S., W. W. and W. D., their heirs and assigns, upon trust to sell the said real estates (except as before excepted). On the 26th December, 1812, S. D. demised to J. S. and W. W. two seams of the coal under the said lands for a term of fifty years at a rent of 105*l.* S. D. died in 1814, and the rent was paid to her seven children. T. T., the mortgagee, by his will, dated the 17th October, 1810, devised all freehold estates held by him in mortgage to J. H. and J. J., their heirs and assigns, and soon after died. By indentures of lease and release, the latter dated 10th June, 1815, between J. S., W. W. and W. D., devisees and trustees named in the will of S. D., of the first part, J. H. and J. J., trustees and executors named in the will of T. T., of the second part, J. T. (a mortgagee of other premises) of the

third part, and B. K. of the fourth part, after reciting (*inter alia*) the mortgage by S. D. to T. T., and that J. S., W. W. and W. D., in execution of the trusts of the will of S. D., had put up for sale by auction the lands comprised in the said mortgage, at which sale B. K. was declared the purchaser of the said lands (except the mines and beds of coal under the same) for the price of 1149*l.* 15*s.*: it was witnessed that J. H. and J. J. (at the request and by the direction and appointment of J. S., W. W. and W. D.) did bargain, sell, release, &c., unto B. K. the said closes of land, "together with all and singular the out-houses, buildings, gardens, &c., waters, water courses, &c., quarries" (omitting the word "mines"), except and always reserved, unto the said J. S. and W. W. during the term of thirty years, all the mines and beds of coal under the said closes of land with liberty to dig and sink pits, &c., for working the coal: to hold the said closes of land (except as before excepted) unto the said B. K., his heirs and assigns for ever:—*Held*, that under this conveyance the mines or seams of coal did not pass to B. K. *Dениson v. Holliday and Others*, 631

## MONEY PAID.

*See PLEADING*, II. (1).

*Mistake of Fact.*

The defendant, an executrix, being entitled to 200*l.* lent by the testator in his lifetime, and secured to him by bond and an equitable mortgage, applied to C., the debtor, for payment. C. referred her to a bank which had purchased of him the mortgaged property, subject to the charges thereon. The bank paid the 200*l.* It turned out that by a will

prepared and attested by the testator, and made subsequently to that under which C. had claimed, but which had been suppressed by the family of C., C. had no title to the property so charged.—*Held*, that the bank could not recover back the money as having been paid under a mistake of facts. *Aiken, Public Officer, &c., v. Elizabeth Short, Executrix of Francis Short*, 210

## MORTGAGE.

*See BANKRUPT*, (1).  
*Covenant*, (1).  
*Mine*, (3).  
*Ship*, (2).

*Receipt of Principal and Interest by Solicitor acting for both Mortgagor and Mortgagee.*

P., a solicitor employed both by a mortgagor and mortgagee, received the interest on the mortgage debt regularly. After a time he fraudulently obtained from the mortgagor a portion of the principal. At first the mortgagee received his interest regularly from P. at his office; but ultimately P. allowed the interest to fall into arrear till a large sum became due to the mortgagee. During this time the mortgagee made no application to the mortgagor in consequence of the irregularity in payment. In September, 1853, the mortgagor paid the mortgagee 43*l.* 13*s.* 9*d.*, as a half year's interest on the principal remaining due; that led to an explanation and the discovery of the fraudulent receipt of the principal by P. The mortgagee did not repudiate the payment at the time. On the 24th of February, the mortgagor wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that P. would

not be able to make good his defalcations to the mortgagee. On the 26th the mortgagee wrote requesting payment by check; and on the 4th of March the mortgagee again wrote, saying that he believed that P. was hopelessly involved, and suggesting that the loss should be divided between them.

*Held*, that P. was the agent of the mortgagee to receive the interest but not the principal; and that in order to bind the mortgagee by the acts of P. in receiving the principal, it was necessary to shew either that what he did was with the intention of adopting the acts of Prior that the position of the mortgagor was altered. *Kent v. Thomas*, 473

#### MUNICIPAL CORPORATION.

##### *Liability for Negligence of their Servants.*

A municipal corporation employing workmen to lay down gas pipes in the borough is responsible for the negligence of the persons so employed. *Scott v. The Mayor, Aldermen and Citizens of the City of Manchester*, 59

#### NEGLIGENCE.

*See MUNICIPAL CORPORATION.*  
*RAILWAY COMPANY* (1), (2), (4).

##### *Action by Visitor.*

A declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a *visitor*, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as

a door which was in a proper condition to be opened: nevertheless by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition and unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of the then carelessness, negligence, default and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff.

*Held*, that the declaration disclosed no cause of action against the defendant. *Southeote v. Stanley*, 247

#### NISI PRIUS.

*See WRIT OF SUMMONS.*

#### NOTICE.

*See PLEADING*, I. (2).  
*TURNPIKE ACT.*

#### NOTICE TO ADMIT DOCUMENTS.

*See PRACTICE*, (3).

#### NOTICE TO QUIT.

*See LANDLORD AND TENANT*, (2).

#### OUTLAWRY.

*See COMMON LAW PROCEDURE ACT*, 1852, (2).  
*PRACTICE*, (6).

#### PATENT.

*See COVENANT*, (3).

##### (1). *Subject-Matter of Patent.*

Vegetable gas had been obtained from oils which were separated from seeds and other oleaginous sub-

stances by pressure. It was discovered that gas might be distilled at once from the seeds, &c., without first separating the oil. *Held*, that assuming the invention to be new, it was such as might be the subject of a patent.

To a declaration stating that the plaintiff was the first inventor of a new manufacture, &c., and that the defendant had infringed his patent right, a plea that the invention was not a matter for which letters patent could by law be granted, does not put in issue the novelty of the invention. *Booth v. Kennard*, 527

(2). *Particulars of Objection.*

In an action for the infringement of a patent, if the particulars of objections, delivered with the pleas in pursuance of the 15 & 16 Vict. c. 83, s. 41, are too general, the party who means to object to them must procure an order for better particulars. The Act does not prevent defective particulars from being available at the trial, and the plaintiff cannot resist the admission of evidence, which is within the literal meaning of the particulars, on the ground that the statement is too general, and that the particulars do not give the required information as to the place in which the invention is alleged to have been used. *Hull v. Bolland*, 184

PAYMENT.

*See BOND*, (2).

PAYMENT INTO COURT.

*See PLEADING*, II. (2).

PENALTY.

*See TURNPIKE ACT.*

PLEADING SEVERAL MATTERS.

*See PRACTICE*, (1).

PLEADING.

*See CHARTER-PARTY*, (1), (3).  
*COVENANT*, (3).  
*JOINT STOCK COMPANY*, (1).  
*PATENT*, (1).  
*VARIANCE*.  
*WATERCOURSE*, (2).

I. DECLARATION.

(1). *Cause of Action.*

A declaration stated that the plaintiff, at the defendant's request, delivered to the defendant, then being a livery-stable keeper, a horse of the plaintiff, to be by him taken due and proper care of, and to be kept in a separate stall in the defendant's stable, for reward to the defendant to be paid by the plaintiff in that behalf. And the defendant accepted the care and custody of the said horse upon the terms aforesaid: yet he would not take due and proper, or any, care thereof, or keep it in a separate stall, and by means of the premises the horse was so kicked by other horses that it became of no value to the plaintiff.—The defendant pleaded "not guilty:" and at the trial a verdict was found for the plaintiff, with 7*l.* damages. *Held*, that the cause of action was founded on contract, not on tort, and consequently the plaintiff was deprived of costs by the County Court Act, 18 & 14 Vict. c. 61, s. 11. *Legge v. Tucker*, 500

(2). *Averment of Notice.*

In a count complaining that the defendant did an act on his own land to the prejudice of the plaintiff's land, it is not necessary to aver notice; and a plea stating that no notice was given is bad. *Blaggrave v. The Bristol Waterworks Company*, 369

(3). *Allegation of Peculiar Damage.*

A declaration alleged that there was a public footway from a field of the plaintiff to another field of the plaintiff, and that the defendants obstructed the way; whereby the plaintiff and his servants, employed in the management of his lands and in tending his cattle, were compelled to go by a longer route, and thereby the work and labour of the plaintiff and his servants were necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess as he otherwise would have done. *Held*, a sufficient allegation of peculiar damage to enable the plaintiff to maintain the action. *Blaggrave v. The Bristol Waterworks Company*, 369

(4). *In Scire Facias.*

In a declaration in scire facias against a shareholder in a Company, under 8 & 9 Vict. c. 16, s. 36, it is sufficient to state that a writ of scire facias against the Company had issued, directed to the sheriff of one county, and that no goods of the Company were found in his bailiwick.

Under that section separate executions may issue against different shareholders till the debt is satisfied. *Nixon v. Brownlow*, 405

(5). *Distress for Arrears of Rent.*

A count alleged that the plaintiff held a workshop as tenant to the defendant at a certain rent, and that the defendant wrongfully seized divers goods and chattels of the plaintiff, of great value, to wit, of the value of 30*l.*, as a distress for arrears of rent, to wit, 18*l.* 10*s.*, then claimed by the defendant to be in arrear, and the defendant afterwards wrongfully sold the said goods and chattels for the alleged arrears of rent, and

costs; whereas in fact a small part only, to wit, 9*l.* of the pretended arrears of rent so distrained for was in arrear. The defendant pleaded not guilty, and at the trial a verdict was found for the plaintiff, with 10*l.* 10*s.* damages. *Held*, in the Exchequer Chamber, that the count disclosed no cause of action. *French v. Phillips*, 564

## II. PLEA.

(1). *Plea Good in Part and Bad in Part.*

A plea to several counts, good as to some and bad as to others is not bad in toto, but may be construed distributively. *Blaggrave v. The Bristol Waterworks Company*, 369

In an action for money paid, &c., the defendant pleaded that the money was paid, &c., for and in respect of certain differences which the plaintiffs, as the defendant's brokers, contracted to pay for them on account of certain unlawful contracts, by way of gaming and wagering, relating to the public funds, and to railways and shares in railways, and to the then present and future prices thereof respectively; and in lieu of, and instead of making, accepting, and paying for transfer thereof, partly contrary to the 7 Geo. 2, c. 8, and partly contrary to the 8 & 9 Vict. c. 109.

*Held*, that the plea being no answer as to the money paid in respect of losses on the sale of shares was bad altogether, and was not made good as to the money paid in respect of losses on sales of consols, by the 75th section of the Common Law Procedure Act, 1852. *Lyne and Another v. Siesfeld*, 278

(2). *Payment into Court.*

To an action of detinue, the de-

fendant cannot plead payment of money into Court in satisfaction of the value of the goods. *Ann Allan, Administratrix of William Allan, deceased, v. Dunn,* 572

(3). *In Covenant by Reversioner.*

A declaration in covenant in a lease, (yielding rent "to the lessor, his heirs and assigns," with a covenant for payment of the rent "to the lessor, his heirs and assigns," by the devisee of the reversion against the lessee,) alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. Plea.—That the reversion of and in the demised premises did not belong to the lessor and his heirs. Replication by way of estoppel.—That the lease was an indenture executed by the defendant, and that he entered and enjoyed the demised premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple, nor did the indenture contain anything to shew that the reversion did not belong to the lessor and his heirs. On demurrer to the replication: *Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the plea was good, as traversing a material allegation in the declaration, and that the replication was bad. *Mary Weld v. Baxter,* 568

POOR LAW UNION.

*See BOND,* (1).

PRACTICE.

*See BILL OF EXCHANGE,* (4).

BILLS OF EXCHANGE ACT, (1),  
(2).

COMMON LAW PROCEDURE ACT,  
1854, (3), (4).

COSTS, (2).

VENDOR AND VENDEE.

(1). *Pleading several Matters.*

In an action on a contract, a special plea of payment into Court, in respect of the breach of a contract set out in the plea, and varying from that stated in the declaration, cannot be pleaded together with pleas in bar of the action. *Hart v. Denny and Another,* 609

In an action of libel, a plea setting out facts to shew that the alleged libel was a fair comment, will not be allowed to be pleaded together with a plea of not guilty. *The Earl of Lucan v. Smith,* 481

(2). *Several Replications.*

A special replication may be allowed together with a general traverse of the plea, though it does not raise a distinct defence, where the special replication enables the parties to raise by demurrer the substantial question to be decided in the cause. *Williams v. The African Steam Navigation Company,* 19

(3). *Notice to Admit Documents.*

A notice to admit documents pursuant to the Common Law Procedure Act, 1852, s. 117, called on the defendant to admit the authority by which the documents were written.—*Held*, that the party called on to make the admissions had a right to reject the whole, and having done so, and a verdict having been obtained by the defendant, the plaintiffs who proved these documents at the trial, had no right to the costs of such proof under the section in question.

Each admission sought is to be treated as a separate part of the notice. *The Oxford, Worcester and Wolverhampton Railway Company v. T. E. Scudamore, Secretary of the Rhymney Iron Company,* 666

(4). *Cross Demurrers.*

According to the practice in the Court of Exchequer, when there are cross-demurrers which go to the whole cause of action, the party first demurring is entitled to begin. *Hill v. Cowdery,* 360

(5). *Judgment by Default.*

After the Reg. Gen. E. T. 1856 (which prescribes that service of pleadings on Saturday, after 2 o'clock, shall be deemed as made on the following Monday), to a declaration delivered on the 1st of August, the defendant after 2 o'clock on the 9th, which was Saturday, delivered a plea at the office of the plaintiff's attorney.

*Held*, that judgment, for want of a plea, signed on the 12th was regular. *Sharp v. Fox,* 496

(6). *Judgment of Reversal of Out-lawry.*

Where a defendant makes default in pleading to an assignment of error coram vobis to reverse an outlawry, the rule for judgment of reversal is absolute in the first instance. *Arding v. Holmer,* 278

(7). *Execution against one of several Joint Defendants.*

Upon a judgment against two defendants, if the sheriff makes a seizure of the goods of one under a fi. fa., though he afterwards abandons the seizure, the plaintiff cannot take the other defendant under a ca. sa. till the writ of fi. fa. has been returned. *Andrews v. Saunderson and Nicholls,* 725

(8). *Death of Sole Claimant in Ejectment.*

After verdict for a sole claimant in ejectment, taken subject to a special case, and before the case came on for argument, the claimant

died. The Court ordered the case to stand over until after a suggestion had been entered by the legal representative of the claimant. (See note p. 650). *Denison v. Holiday,* 61

(9). *Surety for Crown Debtor.*

Where the surety of a Crown debtor has paid the debt of his principal, an order that he shall be placed in the situation of the Crown, and a writ of extent be put in force in his behalf, is not absolute in the first instance, though notice of motion has been served on the principal and the Crown, and no one appears to oppose the application. *Regina v. Salter,* 274

## PREROGATIVE OF CROWN.

*See COUNTY COURT, (3).*

## PRESCRIPTION.

*See MINE, (1).*  
*WATERCOURSE, (2).*

## PRINTER.

*See FRAUDS, STATUTE OF, (2).*

## PRISONER.

*Removal to Prison of Court in which Action is brought.*

A defendant ordinarily residing at K. was arrested in Suffolk and lodged in gaol at Bury, which is 180 miles distant by railway from K. He filed his schedule in the Insolvent Debtors' Court, and the petition was referred to the County Court of Suffolk. Having been brought up to the prison of the Court by habeas corpus at the suit of the plaintiff, the Court refused to remit him to the custody of the sheriff of Suffolk.

*Semble*, that it is the right of a plaintiff to remove a defendant in

custody to the prison of the Court in which the action has been brought.  
*Gurney v. Hallen,* 142

#### PRIVILEGED COMMUNICATION.

*Knowledge acquired by Counsel from his own Observations.*

The rule as to privileged communications between counsel or attorney and client does not extend to facts of which the counsel or attorney of themselves obtain knowledge in the course of trial.

Counsel attended before a magistrate on behalf of a person charged with embezzlement, and a book was produced by the prosecutor in which it was the duty of the person charged to have entered a sum of money received by him, and there was no such entry. On a second examination, the book was again produced when the entry was found. The party charged having brought an action for a malicious prosecution.

*Held*, that the counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation. *Brown v. Foster,* 736

#### PROMISSORY NOTE,

*See JOINT STOCK COMPANY, (3).*

#### PROVISO FOR CESSER.

*See COVENANT, (2).*

#### PUBLIC HEALTH ACT, 1848.

##### (1). *Application of Act to Parish.*

By the Public Health Act, 1848, s. 8, "upon the petition of not less

than one-tenth of the inhabitants, rated, &c., of any city, town, borough, parish, or place, having a known or defined boundary, the General Board of Health may direct a superintending inspector to visit such city, &c., and make public inquiry, &c., as to the sewerage, &c., and as to any other matters in respect whereof the said Board may desire to be informed, &c. By s. 9, before proceeding upon such inquiry, the inspector shall give notice, &c., and upon the completion of such inquiry, he shall report in writing to the General Board of Health, &c., and upon the presentation of such report, the Board shall cause copies to be published and deposited, &c., and the copies so published shall be accompanied by a notice stating that, within a certain time, written statements may be forwarded to the said Board, with respect to any matter contained in or omitted from the said report, or any amendment proposed to be made therein, and all such statements shall be deposited, &c., and shall be open to inspection, &c. By s. 10, if after such inquiry, &c., it shall appear to the General Board expedient that the Act should be applied to the city, town, borough, parish, or place, with respect to which such inquiry has been made upon the petition, &c., and within the same boundaries as those of such city, &c.; they shall report to her Majesty accordingly, and at any time after the presentation of such report, it shall be lawful for her Majesty to order the Act to be put in force within such city, town, borough, parish or place." The parish of Waltham Holy Cross consists of the township of Waltham Abbey, and certain hamlets. The inhabitants of the parish petitioned that the Act might be put in force within the parish. A superintending in-

spector having been appointed, inquired as to the parish, but made his report headed "as to the town of Waltham Abbey," and recommended that the Act should be applied to the *township* of Waltham Abbey. The report was published with a notice by the General Board of Health, that statements might be forwarded with respect to any matters contained in or omitted from the report, &c. No further inquiry by any inspector took place, but on the report of the General Board of Health, by an order in council, the Act was applied within the *parish*:—*Held*, that the Act was legally put in force within the parish.

The Local Board of Health having made a general highway rate instead of a district rate for the repair of the highways in the parish, an action was brought against the clerk of the Local Board to try the validity of the rate, and a verdict taken, subject to a special case, with liberty to the parties to treat the decision as the ruling at nisi prius; before the passing of 17 & 18 Vict. c. 69. The case was stated after the passing of that Act:—*Held*, that the Court were bound to direct a verdict for the plaintiff for the amount of the highway rate, notwithstanding that Act. *Barber v. Jessopp, Clerk to the Local Board of Health for the Parish of Waltham Holy Cross,* 578

(2). *Power of Local Board to make New Streets, and Rate Owners of adjoining Land for Paving them.*

The 69th section of "The Public Health Act, 1848," does not empower a Local Board to make new streets, and rate the owners of the adjoining land for paving them, &c., but the enactment only applies to existing streets not repairable by

the parish. *The Local Board of Health of Kingston-upon-Hull v. Jones,* 489

RAILWAY COMPANY.

*See DAMAGE.  
REVERSIONER.*

(1). *Liability for Injury to Persons voluntarily assisting Servants.*

The rule of law, that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work.

Therefore, where the servants of the defendants, a railway Company, were turning a truck on a turntable, and a person not in the employment of the defendants volunteered to assist them, and whilst so engaged, other servants of the defendants negligently propelled a steam-engine and thereby caused the death of the person who so volunteered: and the servants were persons of competent skill and the defendants did not authorize the negligence.—*Held*, that the defendants were not liable to an action by the personal representative of the deceased. *Caroline Degg, Administratrix of James Degg, deceased, v. The Midland Railway Company,* 773

(2). *Liability for damage to Horse conveyed by Railway.*

A horse was sent by railway directed to the owner at Eton. The sender signed a document in the following terms: Mr. Wise paid for one horse 12s. 6d., Newbury to Windsor. Notice: The directors will not be answerable for damage to any horses conveyed by this railway.

custody to the prison of the Court in which the action has been brought.  
*Gurney v. Hallen,* 142

#### PRIVILEGED COMMUNICATION.

*Knowledge acquired by Counsel from his own Observations.*

The rule as to privileged communications between counsel or attorney and client does not extend to facts of which the counsel or attorney of themselves obtain knowledge in the course of trial.

Counsel attended before a magistrate on behalf of a person charged with embezzlement, and a book was produced by the prosecutor in which it was the duty of the person charged to have entered a sum of money received by him, and there was no such entry. On a second examination, the book was again produced when the entry was found. The party charged having brought an action for a malicious prosecution.

*Held*, that the counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation. *Brown v. Foster,* 736

#### PROMISSORY NOTE,

*See JOINT STOCK COMPANY, (3).*

#### PROVISO FOR CESSER.

*See COVENANT, (2).*

#### PUBLIC HEALTH ACT, 1848.

(1). *Application of Act to Parish.*

By the Public Health Act, 1848, s. 8, "upon the petition of not less

than one-tenth of the inhabitants, rated, &c., of any city, town, borough, parish, or place, having a known or defined boundary, the General Board of Health may direct a superintending inspector to visit such city, &c., and make public inquiry, &c., as to the sewerage, &c., and as to any other matters in respect whereof the said Board may desire to be informed, &c. By s. 9, before proceeding upon such inquiry, the inspector shall give notice, &c., and upon the completion of such inquiry, he shall report in writing to the General Board of Health, &c., and upon the presentation of such report, the Board shall cause copies to be published and deposited, &c., and the copies so published shall be accompanied by a notice stating that, within a certain time, written statements may be forwarded to the said Board, with respect to any matter contained in or omitted from the said report, or any amendment proposed to be made therein, and all such statements shall be deposited, &c., and shall be open to inspection, &c. By s. 10, if after such inquiry, &c., it shall appear to the General Board expedient that the Act should be applied to the city, town, borough, parish, or place, with respect to which such inquiry has been made upon the petition, &c., and within the same boundaries as those of such city, &c.; they shall report to her Majesty accordingly, and at any time after the presentation of such report, it shall be lawful for her Majesty to order the Act to be put in force within such city, town, borough, parish or place." The parish of Waltham Holy Cross consists of the township of Waltham Abbey, and certain hamlets. The inhabitants of the *parish* petitioned that the Act might be put in force within the parish. A superintending in-

spector having been appointed, inquired as to the parish, but made his report headed "as to the town of Waltham Abbey," and recommended that the Act should be applied to the *township* of Waltham Abbey. The report was published with a notice by the General Board of Health, that statements might be forwarded with respect to any matters contained in or omitted from the report, &c. No further inquiry by any inspector took place, but on the report of the General Board of Health, by an order in council, the Act was applied within the *parish*.—*Held*, that the Act was legally put in force within the parish.

The Local Board of Health having made a general highway rate instead of a district rate for the repair of the highways in the parish, an action was brought against the clerk of the Local Board to try the validity of the rate, and a verdict taken, subject to a special case, with liberty to the parties to treat the decision as the ruling at *nisi prius*; before the passing of 17 & 18 Vict. c. 69. The case was stated after the passing of that Act:—*Held*, that the Court were bound to direct a verdict for the plaintiff for the amount of the highway rate, notwithstanding that Act. *Barber v. Jessopp, Clerk to the Local Board of Health for the Parish of Waltham Holy Cross,* 578

(2). *Power of Local Board to make New Streets, and Rate Owners of adjoining Land for Paving them.*

The 69th section of "The Public Health Act, 1848," does not empower a Local Board to make new streets, and rate the owners of the adjoining land for paving them, &c., but the enactment only applies to existing streets not repairable by

the parish. *The Local Board of Health of Kingston-upon-Hull v. Jones,* 489

#### RAILWAY COMPANY.

*See DAMAGE.  
REVERSIONER.*

(1). *Liability for Injury to Persons voluntarily assisting Servants.*

The rule of law, that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work.

Therefore, where the servants of the defendants, a railway Company, were turning a truck on a turntable, and a person not in the employment of the defendants volunteered to assist them, and whilst so engaged, other servants of the defendants negligently propelled a steam-engine and thereby caused the death of the person who so volunteered: and the servants were persons of competent skill and the defendants did not authorize the negligence.—*Held*, that the defendants were not liable to an action by the personal representative of the deceased. *Caroline Degg, Administratrix of James Degg, deceased, v. The Midland Railway Company,* 773

(2). *Liability for damage to Horse conveyed by Railway.*

A horse was sent by railway directed to the owner at Eton. The sender signed a document in the following terms: Mr. Wise paid for one horse 12s. 6d., Newbury to Windsor. Notice: The directors will not be answerable for damage to any horses conveyed by this railway.

The horse arrived safe at the Windsor station, but the owner not appearing to claim it, it was forgotten and left tied up in a horse-box in an exposed situation for twenty-four hours, and was seriously injured by such neglect. *Held*, that the Company were not responsible for the injury done to the horse. *Wise v. The Great Western Railway Company,* 63

by fire, and that they discharged themselves by forwarding the goods to be carried by the defendants; and there being no evidence as to the terms on which the goods were to be carried on the defendants' line, they must be treated as having received them as common carriers, and were consequently liable for their loss. *Collins v. The Bristol and Exeter Railway Company,* 517

#### (3). Liability for Loss by Fire.

The plaintiff delivered at the station of the Great Western Railway Company at Bath, a van load of furniture to be conveyed to Torquay. He signed a receipt note which was headed:—"Bath Station.—To the Great Western Railway Company.—Receive the undermentioned goods on the conditions stated on the other side, to be sent to Torquay Station and delivered to the plaintiff or his agent." One condition was, that the Company would not be answerable for loss or damage by fire. Another condition stated that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The van was placed on a truck and conveyed to Bristol, where the Great Western line ends and the defendants' (the Bristol and Exeter line) begins. The same truck and guard proceeded with the van to Exeter, where the defendants' line ends, and is joined by the line of the South Devon Company, which runs to Torquay. Whilst the van and furniture were at the defendants' station at Exeter they were accidentally destroyed by fire.

*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the Great Western Railway Company received the goods to be carried on their line, subject to the stipulation against loss

#### (4). Conditional Contract for Carriage of Cattle.

A person sending cattle by railway signed a contract containing the following amongst other conditions: "A pass for a drover to ride with his stock will be given. The Company is to be held free from all risk in respect of any damage arising in the loading, or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever." A drover received a pass to go with the cattle. The cattle were not put into proper cattle trucks, but into vans closing with lids, ordinarily used for the conveyance of salt, the drover not objecting. The lid of one of the vans having become closed in the course of the journey several of the cattle were suffocated, the drover being at the time in another carriage.

*Held*, that the conditions were reasonable, and that the Company were not responsible.

*Sembler*, per Martin, B., and Bramwell, B., that notwithstanding 17 & 18 Vict. c. 31, s. 7, special contracts with Railway Companies are binding, whether the conditions contained in them are reasonable or not. *Paddington v. The South Wales Railway Company,* 392

RAMSGATE HARBOUR ACT.  
(32 GEO. 3, c. 74, s. 14).(1). *Act of a Local and Personal Nature.*

By statute 22 Geo. 3, c. 40, the harbour of Ramsgate was vested in trustees, upon certain trusts and, subject thereto, was vested in and to be disposed of by the authority of parliament. Stat. 32 G. 3. c. 74. an "Act for the maintenance and improvement of the harbour of Ramsgate," repealing the former Act, vested the harbour in trustees, who were empowered to impose duties on all ships passing Ramsgate, to be paid to the collector of the customs, &c., in the port whence such ships should set forth or where such ships should arrive. By s. 10, foreign ships are to pay the same rates as ships cleared out of British ports, such rates to be levied in any part of her Majesty's dominions. Sect. 11, empowers collectors to enter and measure ships, and imposes penalties on persons obstructing them. By s. 11, on producing his receipt for payment of duties, the master is entitled to an allowance from merchants or importers. By s. 13, accounts are to be transmitted to the receiver general of the customs. S. 15 gives power to collectors to distrain on non-payment of duties. By s. 53, accounts are to be annually audited and submitted to parliament. By s. 72, penalties may be levied by distress and sale by the warrant of any Justice of the Peace in the town where the offender resides; and in case no sufficient distress is found, the Justice may commit the offender to prison. *Held*, in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer) that the 32 G. 3, c. 74, is an Act of a local and personal nature within the mean-

ing of 5 & 6 Vict. c. 97, having a local object, the improvement of the harbour, and affecting only certain specified classes of her Majesty's subjects.

Statutes which, since the resolution of the House of Commons in 1801, have been printed by the King's printers amongst the public local and personal Acts, are statutes commonly called public local and personal within the meaning of the 5 & 6 Vict. c. 97. *Shepherd, Deputy-Master of the Trinity House, Deptford Strand, v. Sharp*, 115

(2). *Exemption from Duty of Coasting Vessels, carrying only Coal.*

The 32 Geo. 3, c. 74, s. 14, which exempts coasting vessels from payment of duty to *Ramsgate Harbour* oftener than once in a year, includes coasting vessels carrying only coal. *Shepherd, Deputy-Master of the Trinity House, Deptford Strand, v. Moore*, 125

## RATE.

*See DISTRESS.*

## RESTRAINT OF TRADE.

*See COVENANT, (3).*

## REVERSION.

*See PLEADING, II. (3).*

## REVERSIONER.

*Right of Action.*

In order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore, *Held*, that a reversioner could not maintain an action against a

railway Company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rent. *Mumford and Others v. The Oxford, Worcester and Wolverhampton Railway Company,* 34

## SCHEDULE.

*See INSOLVENT.*

## SCIRE FACIAS.

*See BANKING COMPANY.*  
*JOINT STOCK COMPANY, (1).*  
*PLEADING, I. (4).*

## SEWER.

*See DRAIN.*

## SHERIFF.

*See PRACTICE, (7).*

## SHIP.

*See CHARTER-PARTY.*  
*INSURANCE, (1).*

(1). *Power of Captain to bind Owner by settlement for Freight, Demurrage, &c.*

The plaintiff, the owner of a ship, entered into a charter-party with the defendants, containing stipulations as to demurrage. The ship was detained in South America beyond the time stipulated for. The captain was in possession of the ship: he was to be paid freight and demurrage by bill in South America. After the making of the charter-party, and before the settlement hereafter mentioned, the ship with the charter was sold to F. The captain became a partowner of the ship. The cap-

tain having settled the account for freight, demurrage and delay with the defendant, by taking a bill in South America.

*Held*, that F. and the plaintiff, in whose name he was suing, were bound by such settlement.

*Somble*, per *Pollock, C. B.*, and *Martin, B.*, that as captain he must have had authority to make such a settlement. *Alexander v. Davie and Another,* 152

(2). *Right of Mortgagee to Freight.*

In July 1853, the plaintiff being the owner of a ship, sold it to D., of the firm of D. Y. & Co., for 4725*l.*, and received in payment the draft of D. Y. & Co. on B. at twelve months date. In September 1853, the ship sailed from London on a voyage to San Francisco and thence on a seeking voyage home. In June 1854, the captain, who was sent out by D. to take charge of the vessel, chartered it to load a cargo of flour for Sydney. Some days before the bill of exchange became due, D. Y. & Co. requested the plaintiff to renew it, and he consented to do so on having the vessel transferred to him as a security. The vessel was accordingly transferred to him by deed of assignment which was in the form of an absolute sale. In October 1854, the captain, who had no knowledge of the assignment, received 1000*l.* on account of freight, and remitted it to D. Y. & Co. by a bill of exchange. In November 1854, D. Y. & Co., who had acted as ship's husband, became bankrupt. *Held*: first, that though the assignment was in form absolute, yet the Court might look to the real nature of the transaction and see that it was by way of mortgage only.

Secondly: that the plaintiff, being only a mortgagee and not having taken any step to obtain possession,

## TAXATION.

was not entitled to the freight.  
*Gardner v. Cazenove and Others*, 423

## SLANDER.

*Special Damage.*

In an action for slander of the plaintiff in his business of inn-keeper, it is sufficient to allege and prove, as special damage, a general loss of custom, without stating the names of the customers who ceased to frequent the inn. *Evans v. Harries*, 251

## SOLICITOR.

*See BOND, (2).*  
*MORTGAGE.*

## SPECIAL CASE.

*See PRACTICE, (8).*

## SPECIAL DAMAGE.

*See SLANDER.*

## STAY OF PROCEEDINGS.

*See BILL OF EXCHANGE, (4).*

## SUGGESTION.

*See PRACTICE, (8).*

## SURETY.

*See BOND, (1).*  
*PRACTICE, (9).*

## SURRENDER.

*See LANDLORD AND TENANT, (4).*

## TAXATION.

*See ARBITRATION, (2).*  
*COSTS, (3).*

## USURY. 1001

## THEATRE.

*See LICENCE.*

## TRESPASS.

*See COMMON LAW PROCEDURE ACT, 1854, (2).*  
*LICENCE.*

## TRUSTEE.

*See FEME COVERT, (2).*  
*LICENCE.*  
*LIVERPOOL DOCKS.*

## TURNPIKE ACT (3 GEO. 4, c. 126).

The proviso in the 143rd section of the Turnpike Act, 3 Geo. 4, c. 126, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section : therefore, if a party seeking to recover penalties imposed by that act omits to give the requisite notice or to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett v. Warner*, 388

## USURY.

*Bill of Exchange for Usurious Loan on Security of Land.*

A bill of exchange given before the 10th August, 1854, in pursuance of an usurious contract for the loan and forbearance of money upon the security of land, is not rendered valid by 2 & 3 Vict. c. 37. *Langton v. Haynes*, 366

VAGRANT ACT (5 Geo. 4, c. 83, s. 3).

(1). *Frequenting Public Place with Intent to commit Felony.*

A commitment, under the 5 Geo. 4, c. 83, s. 4, alleged that the prisoner, "being a suspected person and reputed thief frequenting the public streets of the city, then and there was found in Railway Place, being a place of public resort within the city, with intent feloniously to steal," &c.:—*Held*, sufficient. *In re Cross*, 651

(2). *Leaving Wife or Child Chargeable.*

By 5 Geo. 4, c. 83, s. 4, every person running away and leaving his wife or his or her child or children chargeable, or whereby she, &c., shall become chargeable to any parish, &c., shall be deemed a rogue and vagabond, and punishable as such. *Held*, that a man leaving his wife cannot be treated as a rogue, unless the wife has become actually chargeable. *Heath v. Heape*, 478

#### VARIANCE.

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoy, and still of right ought to have and enjoy, the water of a stream which had been used to flow alongside the said lands and premises, is not supported by proof that the plaintiff was a lessee of mines under land adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. *Insole v. James and Another*, 243

VAN DIEMAN'S LAND COMPANY.

#### *Forfeiture of Shares.*

By the charter of The Van Dieman's Land Company it was provided, that there should be held in each year a general meeting at a particular time. Special general meetings might also be called, of which notice was to be given by advertisement. No business was to be transacted at any special general meeting besides the business for which it was called. By the 14th section of the Company's Act, 6 Geo. 4, c. 39, no advantage is to be taken of the forfeiture of shares, unless the same shall be declared to be forfeited at some general or special general meeting. A meeting, after the time named in the charter for the annual general meeting, was called by advertisement "to receive the annual report; to declare the forfeiture of certain shares, &c., and on other business; and the Company thereby further gave notice that the said general meeting was made special for the purpose of electing directors." *Held*, that such meeting was competent, as a special general meeting, to declare the shares forfeited.

By the Van Dieman's Land Company's Act, 6 Geo. 4, c. 39, s. 14, no advantage is to be taken of the forfeiture of any shares until after thirty days' notice shall have been given to the owner or owners thereof. By s. 12, in cases where the holder of any share shall become bankrupt, &c., an affidavit shall be made and delivered to the clerk of the Company that he may register, &c., and until such affidavit shall have been delivered, no such person shall be entitled to sell or assign such share or to claim any dividend. R., the proprietor of shares, having

become bankrupt in 1847, his assignees took no steps to procure their names to be placed on the register till 1853. Calls were made of which the assignees had notice. In 1851 the shares were declared forfeited by the Company. Notice of such forfeiture was served upon the bankrupt, his name being at the time on the register as owner of the shares. *Held*, that such notice was properly served upon the bankrupt. *Graham and Another, Assignees of G. Rougemont, a Bankrupt, v. The Van Diegem's Land Company*, 541

## VENDOR AND VENDEE.

*Title of Vendee to Goods obtained by False Representations.*

On appeal under the 34th section of the Common Law Procedure Act, 1854, if a rule nisi be granted, cause must be shewn in the first instance, and only one counsel on each side will be heard.

The statement of the case does not preclude the respondent from objecting that no appeal will lie.

In April, 1853, J. & Co., brokers, sold for the plaintiffs, manufacturing chemists, two tons of tartaric acid, to be delivered in November. In October, 1853, G. & Co., brokers, sold for the plaintiffs two tons of tartaric acid, to be also delivered in November. J. & Co. and G. & Co. respectively sent to the plaintiffs sold notes, not disclosing any principal. In November, a clerk of one Anderson, a merchant, left at the plaintiffs' counting house two delivery orders. One was from J. & Co., for delivery to T. Broomhall or order of one of the tons of acid: this order was indorsed by T. Broomhall, "Deliver to my order." The other delivery order was from G. & Co., for delivery to T. Broomhall or order of the two tons of acid: this

order was indorsed, "T. Broomhall—Deliver to W. Leask: J. Ellis—Deliver at Custom House Quay to my sub-order. W. Leask." Anderson induced Leask to purchase from Ellis the acid for him, upon a false representation that he was acting on behalf of V. N. & Co. Ellis thereupon gave to Leask the delivery orders which he had received from Broomhall. Leask indorsed the orders specially deliverable to himself, and delivered them to Anderson for the purpose of enabling him to inspect the acid. On the 28th of November Anderson went to the plaintiffs and stated that he had purchased from Leask the acid mentioned in the delivery orders, and he requested the plaintiffs to deliver it at the Custom House Quay for him. On the faith of this statement, the plaintiffs gave Anderson a delivery order and the acid was transferred into his name. Anderson then obtained warrants and pledged the acid with the defendant for a bona fide advance.

*Held*, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer) that under these circumstances, the relation of vendor and vendee did not subsist between the plaintiffs and Anderson, neither did the property in the acid pass to Anderson; and that mere possession, with no further indicia of title than the delivery orders, was not sufficient to entitle the defendant, though a bona fide pawnee, to resist the claim of the plaintiffs in an action of trover. *Kingsford and Another v. Merry*, 503

## VISITOR.

*See NEGLIGENCE.*

## WARRANT.

*See DISTRESS.*

EXCH.

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## VISITOR.

*See NEGLIGENCE.*

## WARRANT.

*See DISTRESS.*

EXCH.

**WARRANTY.***See CONTRACT, (3).***WATER.***See CANAL.***WATERCOURSE.***See CANAL.***VARIANCE.****(1). Abstraction of Water rising from Spring.**

The water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose: *Held*, that an action lay by the mill owner against the person so abstracting the water. *Dudden v. The Guardians of the Poor of the Clutton Union,* 627

**(2). Use of Water for necessary Working of Mine.**

Declaration for wrongfully throwing sand, stone, rubble and other stuff into a natural stream of water flowing through the plaintiff's lands, whereby the channel was obstructed and the water flowed over and upon the lands and destroyed their produce.—Fifth plea: that the defendants were the occupiers of lands near to and above the plaintiff's lands and of a tin mine situate within the lands of the defendants; and that the defendants and all other occupiers of the lands and tin mine of the defendants, for twenty years, &c., enjoyed as of right and without interruption, the right from time to

time as occasion required, at their free will and pleasure, of working the tin mine and winning therefrom tin and tin ore, and in the course of so working and winning the same, of washing away, by means of the stream of water in the declaration mentioned, where the same flows through the lands and tin mine of the defendants, the sand, stones, rubble and other stuff which were dislodged or severed in the course of so working the tin mine, and of casting and throwing from and out of the tin mine the sand, stones, rubble and other stuff into the said stream where the same flows through the land and tin mine of the defendants, and of having the same washed, and carried away by the flow of the stream towards the sea, to that part of the channel of the stream which is situated within the lands of the plaintiff, as to the lands and tin mines of the defendants appertaining, and for the more beneficial enjoyment thereof, &c. The plea then justified the acts complained of in the exercise of the above right. The sixth plea alleged an enjoyment of the right for forty years. The eighth plea stated that the land of the plaintiff and the land and tin mine of the defendants and the channel of the stream were within the Stannaries of Cornwall and subject to the customs of the said Stannaries, and that there was an immemorial custom for the tinners and miners within the Stannaries, working and winning tin and tin ore from any tin mine near to a stream of water flowing by such mine, to wash away in such stream the sand, stones, and rubble which should become dislodged in the course of working the mine, and cast the same into the stream, &c. The ninth plea stated that the defendants and other occupiers of the land

wherein the tin mine of the defendants is situate, for twenty years, &c., enjoyed as of right, and without interruption, the right from time to time as occasion required, at their free will and pleasure, of using the stream where the same flowed through the lands of the defendants for the purpose of getting such minerals as they might desire and be able to get therefrom and for washing away the sand, stones, rubble and other stuff which it might be necessary to dislodge in the course of so getting the minerals and of having the same washed away by the water of the stream, &c. The tenth plea alleged an enjoyment of a similar right for forty years. The twelfth plea alleged an immemorial custom for miners within the Stannaries, working and winning tin and other minerals and things capable of being dug or won from any mine situate near a stream of water, to wash away by means of such stream the sand, stones, rubble and other stuff which should become dislodged in the course of working the mine, &c. On demurrer to these pleas.—*Held*, first, that the fifth, sixth, ninth, and tenth pleas were good, since the right claimed in those pleas might be the subject-matter of a grant. Secondly, that the eighth and twelfth pleas were also good, for the custom alleged in those pleas was not indefinite or unreasonable, the user being limited to the necessary working of the mine. *Carlyon v. Lovering and Others*, 784

## WILL.

*See DEVISE.*

## WATERWORKS COMPANY.

*See LANDS CLAUSES CONSOLIDATION ACT, 1845.*

## WINDING-UP ACT.

*See JOINT STOCK COMPANY, (1).*

## WRIT OF ERROR.

*See COMMON LAW PROCEDURE ACT, 1852, (2).*

## WRIT OF SUMMONS.

*See COMMON LAW PROCEDURE ACT, 1852, (1).*

*Setting aside Service.*

It is no ground for setting aside the service of a writ of summons, that it was served on the defendant whilst attending in a Nisi Prius Court, in obedience to a subpoena, to give evidence in a cause in which he was plaintiff. *Poole v. Gould*, 99

## WRIT OF TRIAL.

*Certificate for Costs.*

The presiding officer on a writ of trial has no power, under the 13 & 14 Vict. c. 61, s. 12, to certify for costs after he has returned the writ. *Knapman v. Pryer* 719

THE END.

